IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

NO.

J. M. CHANDLER,

Petitioner

vs.

J. (JEROME) O. BROWN, DARYL DAVIS, B. A. ROSS, D. A. ROSS, EL CAPITAN OIL COMPANY, A Delaware Corporation, LONE STAR PRODUCING COMPANY, a Corporation duly incorporated under the laws of the State of Texas, GEORGE KOGAN, WILMA LAKIN, AND HUSBAND, LAKIN, PHILIP SCHACTER, RAY T. DEVINE, HARRY LEVIN, EDWARD J. LEVIN, AND GEORGE BURTON,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

J. M. Chandler, your Petitioner, prays that a

writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Fifth Circuit, entered in this cause on September 2, 1960, and became final on the 3rd day of October, 1960, upon which day and date, an order was entered denying Petitioner's petition for rehearing which petition had been seasonably filed and had been entertained and considered by the Court.

OPINIONS BELOW

The judgment of the United States District Court for the Western District of Texas (Printed Record, Court of Appeals, page 192-196) (Tr. page 192-196) has not been reported. A copy is attached hereto as Appendix "A." The opinion of the Court of Appeals is reported in *Chandler vs. Brown, et al, C.C. A., 5th; 282 F2d 186.* A copy of the opinion is attached as Appendix "B." The judgment of the Court of Appeals was entered on September 2nd, 1960, a copy of which is attached as Appendix "C." A petition for rehearing was denied on October 3, 1960, a copy of which is attached hereto as Appendix "D." The opinion of the Court of Civil Appeals of Texas in the case of Chandler vs. Brown et al, reported in 301 S.W. 2nd 720 is involved in this cause since same is attacked by petitioner as one of the links in the chain of state proceedings in which petitioner's federal rights, as claimed by him, have been denied to petitioner, is shown as Appendix "F" attached hereto.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254(1). Title 28, U.S.C.A. Sec. 1254(1). In the alternative Petitioner invokes the jurisdiction of this Court under Rule 19, Subdivision 1(b). Title 28 U.S.C. Rules of the Supreme Court.

The judgment of the Court of Appeals for the Fifth Circuit, which Petitioner seeks to have reviewed by this Court, was entered September 2, 1960. (Transcript from Court of Appeals, p. 224). Petitioner seasonably filed his petition for rehearing (Tr. 225-235), which was entertained by the Court and denied on the 3rd day of October, 1960 (Tr. 236). By order of Mr. Justice, W. O. Douglas entered on the 29th day of December, 1960, time within which to file petitions for certiorari was extended to and including February 15th, 1961, Title 28, U.S.C. 2101(c), Title 28, U.S.C.A. 2101(c). By order signed by the Honorable Chief Justice Earl Warren, entered on the 8th day of February, 1961, an additional extension of time was granted within which to file petition for certiorari, and was so extended to and including February 27, 1961, Tit. 28 U.S.C. 2101(c); Title 28 U.S.C.A. 2101(c).

QUESTIONS PRESENTED

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PRELIMINARY STATEMENT

Some of the questions presented cannot be adequately framed without reference to this court's

prior action in the case styled, *J. M. Chandler vs. J. (Jerome) O. Brown, et al*, 356, U.S. 930; 2 L. Ed. 2d 761; 78 S. Ct. 773, in which case this Court denied Petitioner's application for writ of certiorari, without written opinion. That case originated in the District Court of Midland County, Texas, in which an erroneous and unauthorized summary judgment was rendered, such as is prohibited by Sec. 1 of the 14th Amendment to the Constitution of the United States. Petitioner thereafter exhausted his remedies by appealing from such unauthorized and erroneous summary judgment, through the appellate courts of Texas, up to and including the Supreme Court of the State of Texas, which is the Court of last resort in Texas. After petitioner's motion for rehearing was overruled in the State Supreme Court and petitioner had been denied leave to file a second motion for a rehearing (the privilege of filing a second motion for rehearing is not an absolute right, but a privilege granted only by leave of the Court) he then filed his petition for writ of certiorari in this Court, which was so denied, without written opinion.

1. Essentially the first question presented, in view of these facts, is whether petitioner's claim for relief is res judicata, by reason of the state proceedings and judgments as held by the Court of Appeals in its opinion on pages 1 and 7 (Tr. pp 216, 222) and as further held by the Court of Appeals, in its judgment and decision and in ruling, by approving

and sanctioning, the judgment of the trial court, by affirming it; or has petitioner by exhausting his said remedies by timely and proper appeals and reviews through the State Courts; and then prosecuting his petition for writ of certiorari, in this Court, which was denied, without written opinion, destroyed the defense and/or bar of res judicata, or rendered same without force and effect as a defense to his claim for relief, as set forth in this cause?

2. Where the Supreme Court of the United States denied Petitioner's petition for certiorari, without written opinion, did such an act amount to an affirmance or approval of the judgment or judgments as therein sought to be reviewed in such manner as to thereby render this cause or claim for relief res judicata?

3. The third question presented is, in view of the facts, as set out in the preliminary statement above, has petitioner thereby created, completed, and laid a proper predicate and satisfied all prerequisites required of him to entitle petitioner to apply to a proper Federal District Court to have his claim for relief and his federal rights, as guaranteed to him by Sec. I of the 14th Amendment of the Constitution of the United States reviewed and tried, on the merits of his claim for relief, without being barred by a plea that his claim for relief is res judicata?

4. The Court of Appeals held that under Rule 12 (b) (6), Federal Rules of Civil Procedure, the trial court properly treated the motion to dismiss as a motion for summary judgment, because matters outside the record were presented to the Court. However, the court below, inadvertently overlooked the fact that practically all of petitioner's offers in evidence were *excluded by the trial court*, and therefore placed beyond the court's consideration. Furthermore, it is evident from the face of the trial court's judgment that he did not proceed on this theory. The trial court's judgment shows that he purported to grant relief on a motion for summary judgement, theretofore, filed by respondents. All motions were abandoned or waived by respondents except the motion to dismiss as filed on the 17th of January, 1958. The question here presented is essentially this, "Did the Federal District Judge, as a hearer of said motion to dismiss and petitioner's answer and reply thereto, have the authority under said Subhead (6) of Subsection (b) of Rule 12, to consider such motion to dismiss as a motion for summary judgment, after excluding petitioner's offers in evidence; and further was such hearing conducted in keeping with Rule 56 of the Federal Rules of Civil Procedure, being the Federal Summary Judgment Rule; or by the trial court so excluding petitioner's many offers in evidence did not the trial court thereby preclude the rendition of the summary judgment, as so entered, granting affirmative relief to respondents, who had no pleadings seeking such relief; and who had abandoned and/or waived all other motions except the motion to dis-

miss, as filed by some of respondents on said 17th day of January, 1958?"

5. The fifth question presented is this, did not the trial court wrongfully deny petitioner the right to file amended and/or supplemental pleadings as were necessary and proper in order that justice might be done, setting up the fact that he had been denied his civil rights, equal protection of the laws of the State of Texas and had been deprived of his property, property rights and vested rights without due process of law in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States when no respondent did or could have rightfully plead surprise, and no right or rights of any respondent was or could have been prejudiced thereby and did not the Court of Appeals err in approving and sanctioning the judgment of the trial court, by affirming it, when the trial court had erred and, as petitioner believes, had abused its discretion, in denying petitioner leave to file the amended and/or supplemental pleadings, necessary to fully show in what manner, where and when petitioner had been so denied his federal rights, as claimed by him under Sec. I of the 14th Amendment to the Constitution of the United States and in holding in its judgment and decision and in ruling that petitioner's points on appeal by which he raised and urged this error, on the part of the trial judge were devoid of merit and overruling such points when no respondent had raised the question of surprise, or under the circum-

stances could have raised such question and did not claim that their rights would be prejudiced by such amended and/or supplemental pleadings or could rightfully raise such issue, and in order that justice might be done?

6. Where petitioner had been wrongfully denied, by the trial judge, the right and privilege of filing amended and/or supplemental pleadings setting up his federal rights as claimed by him, under Sec. I of the 14th Amendment to the Constitution of the United States, and his only pleadings setting up his federal rights, so asserted by him, was in his answer and reply of the motion to dismiss, filed by some of the respondents on the 17th day of January, 1958, in which answer and reply (Tr. 106-127) petitioner set out how, when and where he had been denied his civil rights, equal protection of the laws of the State of Texas and had been deprived of his property, property rights and vested rights, without due process of law, all in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States, the question here presented is, was not such answer and reply sufficient and ample to inject such federal question into petitioner's bill of complaint and to defeat respondents' motion to dismiss, since petitioner's allegations on a motion to dismiss must be taken as true?

7. Where petitioner had alleged in his answer and

reply to the motion of some of the respondents to dismiss, as filed by them on the 17th day of January, 1958, that he had been denied his civil rights, and equal protection of the laws of the State of Texas, and had been deprived of his property, property rights and vested rights, without due process of law, all in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States and had offered in evidence, for the limited purpose of showing how, when and where in each step of the proceedings through the State Courts that he had been denied his Federal rights as claimed by him under Sec. I of the 14th Amendment to the Constitution of the United States, (Tr. 158) records of all proceedings through the State Courts, beginning with the erroneous and unauthorized summary proceedings in the District Court of Midland County, Texas, in Cause No. 6390, including the erroneous and unauthorized judgment therein, and up to and including the final action of the Supreme Court of Texas, as well as the action of this Court in denying the petition for writ of certiorari in the case styled *Chandler vs. Brown, et al, supra*, without written opinion, even though many of petitioner's offers in evidence *were excluded by the trial Court*, the question here presented is, does not the record show that petitioner has been denied his civil rights and equal protection of the laws of the State of Texas without due process of law, and deprived of his property, property rights and vested rights, without due process of law, all in violation of the provisions of Sec. I of the 14th Amendment to the Constitution of the United States?

8. Where petitioner had been wrongfully denied the right and privilege of filing amended and/or supplemental pleadings setting up his federal rights claimed under Sec. I of the 14th Amendment to the Constitution of the United States, and setting up the additional grounds for federal jurisdiction under Tit. 28 U.S.C., Sec. 1331; Tit. 28 U.S.C.A., Sec. 1331; but had filed an answer and reply (Tr. 106-127) to the motion to dismiss as filed by some of the respondents, on the 17th day of January, 1958, in which he set out that he had been denied his civil rights and equal protection of the laws of the State of Texas as guaranteed to him by said Sec. I of the 14th Amendment to the Constitution of the United States, and had been deprived of his property, property rights and vested rights, without due process of law as prohibited by said Section of the 14th Amendment; the question here presented is essentially this, is such answer and reply (Tr. 106-127) a sufficient and ample pleading to raise the question of the denial of petitioner's said federal rights and to inject the additional ground for federal jurisdiction for this cause under Title 28 U.S.C., Sec. 1331; Title 28 U.S.C.A., Sec. 1331, said answer and reply, further showing, that petitioner had filed his petition for writ of certiorari in this Court in the case of *Chandler vs. Brown, supra,* which was denied, without written opinion?

9. Is Petitioner's right to recover his one-third undivided interest in all the oil, gas, and other minerals in, on and under, and which have heretofore

been produced, as well as, which may hereafter be produced from the land in controversy barred by the Statutes of Limitations of Texas, when the four year Statute of Limitations is not applicable to suits for the recovery of real property, by its own express terms, and the Statutes of Limitations were not set in operation as against this mineral estate until such minerals were reduced to the possession of respondents by actual production of same. Furthermore, both limitation and adverse possession must be specially plead and proven to be available as a defense in a land title suit. A different rule controls the claim of adverse possession of severed mineral rights or estate, to that which applies to a surface estate?

10. Is Petitioner's right to recover in this law-suit barred by the defense or defenses of laches, stale demand, estoppel, negligence and/or dilatoriness when it has been repeatedly held by the appellate courts of Texas and former decisions of the Court of Appeals, for the 5th Circuit, that such defenses have no application to a legal title to real property in the State of Texas, or to a superior equitable title?

11. Where Petitioner asserts a right, which is granted and guaranteed to him by the laws and Constitution of the United States, the question here presented is, can such federal right or rights be denied Petitioner on the theory that same are con-

trolled by local laws, as the Court of Appeals has held in this case, to-wit; that it was bound by the interpretation, construction, and application of the laws of the State of Texas pertaining to real property, as set out by the Court of Civil Appeals, in its opinion, in the case styled *Chandler vs. Brown, et al*, 301 SW 2d (702), 720, when Petitioner was directly attacking the validity of such judgment and decision on the ground that same had denied to Petitioner his civil rights, equal protection of the laws of the State of Texas and had deprived Petitioner of his property, property rights and vested rights without due process of law in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States; or when such Federal rights are so asserted, is it not a fact that such *Federal rights* become paramount and superior to any local law, or local control?

12. Where respondents filed a motion to dismiss Petitioner's complaint, as they did in the case at bar on January 17, 1958 (Tr. 75-106) and attached thereto, as an exhibit, a copy of plaintiff's second amended original petition, as filed in the District Court of Midland County, Texas, 142nd Judicial District of Texas (Tr. 78-94) and under Rule 10(c) Federal Rules of Civil Procedure, such exhibit is made a part of such motion to dismiss, for all purposes; the question here presented is essentially this, do the allegations in the body of the motion take precedence over the allegations of the exhibit; or do the allegations of the exhibit take precedence

over and control the allegations in the body of the motion, when there is a conflict in such allegations, to such an extent that the respondents, by so attaching such exhibit to their motion, precluded the rendition of a judgment, dismissing Petitioner's claim for relief, with prejudice, as was done in this case, and certainly precluded the rendition of any summary judgment and the granting of any summary or affirmative relief to respondents herein?

13. Has not Petitioner been denied due process of law and deprived of his property without due process of law as guaranteed to him by the 5th Amendment to the Constitution of the United States, by the dismissal of his bill of complaint and claim for relief, with prejudice, and granting affirmative relief to respondents, who had no pleading seeking such affirmative relief, and a summary judgment was not proper because there were many genuine issues, as to material facts, between the parties to this law-suit, which were apparent from the pleadings and Petitioner was thereby denied his right to a trial of his cause, on its merits, and was denied his day in court, his opportunity to offer his evidence on the trial of this cause, on its merits, and his property was taken arbitrarily and discriminatorily without due process of law, all in violation of the guarantees and provisions of the 5th Amendment to the Constitution of the United States?

14. Has not Petitioner been denied his right of a

trial in this cause, on its merits, by a jury, by the dismissal of his cause, with prejudice and granting affirmative and summary relief to respondents in violation of the provisions of the 7th Amendment to the Constitution of the United States?

15. Upon the hearing in the Trial Court, the only motion to dismiss, which was presented by respondents and therefore the only motion which should have been considered and could have been considered by the Trial Court, was the one filed by some of the respondents on the 17th day of January, 1958, and Petitioner had filed his answer and reply thereto, setting up the facts that he had exhausted his remedies by proper appeals through the State Courts, up to and including his filing petition for writ of certiorari in this Court, which was denied, without written opinion; the question here presented is, in view of these facts, has Petitioner thereby been denied the due process of law as guaranteed to him by the 5th Amendment to the Constitution of the United States, in that he has been denied a hearing on his claimed federal rights and has been deprived of his property, property rights and vested rights, without due process of law by the trial court and the Court of Appeals, in its act, of approving and sanctioning, by affirming the erroneous judgment of the District Court, which dismissed Petitioner's bill of complaint, with prejudice, and granted affirmative relief to the respondents as named in the motion to dismiss, even though such respondents had filed no pleadings seeking af-

firmative relief, all of such actions thereby denying Petitioner his day in court, and an opportunity to offer his evidence, on a trial of his cause, upon its merits, all in violation of the guarantees and provisions of said 5th Amendment.

16. Upon the hearing in the trial court the respondents abandoned and/or waived the only motion for summary judgment, which was the one filed by respondent, J. (Jerome) O. Brown, who was dead at the time of the hearing, and had died long prior thereto, and Petitioner had filed proper motions in the trial court to either dismiss the motion for summary judgment, as ostensibly filed in behalf of the respondent, J. (Jerome) O. Brown, or, and in the alternative, to abate same until his heirs, successors, assigns, and/or legal representatives, could be determined and subsbtituted in this cause for the dead man. Notwithstanding these facts, the trial court granted summary relief to the dead man, respondent, J. (Jerome) O. Brown, and granted summary relief to the other respondents, as named in said judgment, even though no other respondents had filed such motion or motions, seeking such summary relief. Petitioner had filed his controverting answer and affidavit, to the motion of respondent, J. O. Brown, for summary judgment (Tr. 58-69) fully denying all allegations as made by said respondent, except those expressly admitted. The question here presented is, has Petitioner been denied due process of law, as guaranteed to him by the 5th Amendment to the Federal Constitution, in

that he has been deprived of his property, property rights and vested rights, without the due process of law, as guaranteed to him by said 5th Amendment to the Constitution of the United States, by the Court of Appeals, approving and sanctioning, by affirming the erroneous and unauthorized judgment of the trial court, granting such affirmative and summary relief?

17. Is Petitioner's claim for relief to be controlled by the case of *Commissioner of Internal Revenue v. Sunnen*, 1948, 333 U.S. 591, 597, as held by the Court of Appeals (Page 7 of its opinion), or is Petitioner's claim for relief to be controlled by the case of *Hamilton Brown Shoe Company vs. Wolf Bros. & Co.*, 248 U.S. 251, p. 258; 36 S. Ct. 269 p. 271; 60 L. Ed. 629, and the later cases decided by this court approving and reaffirming the holdings in the Hamilton Brown Shoe Company case, to the effect that where this Court denies petition for certiorari, without written opinion, that such an act imports no expression of opinion as to the merits of the case and that same is not res judicata, as to any issue, on the merits? The Case of *Commissioner of Internal Revenue vs. Sunnen, supra*, has no application to the case at bar for two reasons: (1) the opinion discloses that there had been a trial on the merits, in that case, while Petitioner has never had a trial, on the merits, in the case at bar, either in the State proceedings or in the Federal District Court, and (2) there is nothing in the record of the Commissioner of Internal Revenue case

which discloses that a former application for writ of certiorari had been denied, which procedure is definitely established in the case at bar, and was plead by petitioner in his answer and reply to respondents' motion to dismiss (Tr. 106-127) to show why the plea of res judicata, as set up in respondents' said motion had no application to and was not a bar or defense against Petitioner's claim for relief in this case.

18. Where the only motion which was presented to the trial court upon the hearing was the motion to dismiss as filed by some of the respondents on the 17th day of January, 1958, and therefore the only motion that should have been considered and could have been considered, since respondents abandoned and/or waived all other motions and the motion as filed on said 17th day of January, 1958, admitted under Rule 12 (b), Federal Rules of Civil Procedure, Title 28 U.S.C., Title 28, U.S.C.A., the existence and validity of all material matters set out in Petitioner's second amended original petition; but saying in effect that Petitioner was not entitled to recover thereon because same was res judicata; however, same was not res judicata and even respondents alleged and offered evidence establishing the fact that Petitioner's claim for relief was not res judicata. The question here presented is this: Should not the Court of Appeals have reversed and rendered this cause in favor of Petitioner, awarding to Petitioner his one-third undi-

vided interest in and to all of the oil, gas and other minerals of every kind, character and description in, on and under the land in controversy, as well as all minerals which have been produced and may hereafter be produced therefrom, together with his damages in the sum of Five Hundred Thousand ($500,000.00) Dollars, and his annual rentals of Ten Thousand ($10,000.00) Dollars per year from April 22, 1955, since the effect of said motion to dismiss, as filed by some of respondents on the 17th of January, 1958, was to confess judgment, unless the plea of res judicata was a valid defense to Petitioner's claim for relief; instead of affirming the judgment of the trial court, since the only proper judgment that the trial court should have rendered upon the hearing of said motion to dismiss was one in favor of Plaintiff, granting him such relief as above mentioned, and for the reason or reasons as above set out; and in the alternative, certainly the Court of Appeals should have reversed and remanded this cause to the Trial Court for a trial of Petitioner's claim for relief, on its merits, as the law directs in such cases?

STATEMENT OF NATURE OF CASE

Petitioner J. M. Chandler, in this his petition for writ of certiorari, seeks to have this Court review the judgment and decision of the United States Court of Appeals, 5th Circuit, sitting in New Orleans, La., which judgment and decision affirmed an order and judgment of the United States District

Court, for the Western District of Texas, dismissing Petitioner's claims for relief pursuant to (a) Motion to Dismiss: as filed by some of the respondents on January 17, 1958, which was the only motion presented and urged by respondents upon the hearing and therefore the only motion which the trial court should have considered and had the authority to consider, since respondents had abandoned and/or waived all other motions. This motion to dismiss, as so filed by respondents, admitted the existence and validity of all of petitioner's allegations in his second amended original petition, under Federal Rules of Civil Procedure, Rule 12 (b), Tit. 28 U.S.C.: Title 28 U.S.C.A., but setting out in substance that Petitioner was not entitled to recover thereon because same was res judicata, the defense of res judicata being the only defense or bar set out in said motion. Petitioner's claim for relief was not res judicata, therefore the proper judgment that should have been entered was one in favor of Petitioner, since the effect of said motion to dismiss was to confess judgment unless Petitioner's claim for relief was barred by the defense of res judicata; (b) Motion for Summary Judgment: filed by only one respondent, to wit, J. (Jerome) O. Brown, which respondents abandoned and/or waived upon the hearing, by not presenting same to the trial court and urging action thereon; (c) Notwithstanding the fact that no respondent had any pleadings or counterclaims seeking affirmative relief; the court, nevertheless granted affirmative relief to respondents named therein, divesting Petitioner of title to a one-third undivided mineral interest in all min-

erals of every kind, character and description in, on and under the land in controversy, as well as all minerals which have heretofore been produced and may hereafter be produced therefrom, and; (d) Notwithstanding the fact that this case had been carried on the docket of the United States District Court for the Western District of Texas, throughout the appellate proceedings through the State Courts and including the prosecution of Petition for Writ of Certiorari, as was filed in this Court in the case of *Chandler vs. Brown, supra*, which was denied, without written opinion, by agreement between counsel for Petitioner and counsel for respondents, made in open court and approved by the trial judge and certainly respondents acquiesced in such continuances, knowing all of the time that when the case was disposed of, unless petition for certiorari was granted in said case by this Court, that it would be necessary and proper for Petitioner to file amended and/or supplemental pleadings showing what had transpired in the proceedings since the second amended original petition (bill of complaint) was so filed by Petitioner herein; notwithstanding this state of facts the trial court denied leave to file the proper amended and/or supplemental pleadings necessary to set up Petitioner's federal rights as guaranteed to him by Sec. I of the 14th Amendment to the Constitution of the United States (Tr. pp. 143, 195), which had been denied Petitioner throughout the erroneous summary proceedings in the State courts starting with the summary proceedings in the District Court of Midland County, Texas, and ending

in the Supreme Court of Texas, and also setting out that Petitioner had made application for writ of certiorari in this Court, which was denied, without written opinion, in the case of *Chandler vs. Brown, et al, supra*, and the fact that such proceedings destroyed the bar or defense of the plea of res judicata as to Petitioner's claim for relief. However, Petitioner, in his answer and reply to the motion to dismiss (Tr. 106-127) did set up in what manner, how and when he had been denied his civil rights, equal protection of the laws of the State of Texas and deprived of his property, property rights and vested rights, without due process of law, all in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States, including the further fact that he had filed in this Court his petition for writ of certiorari, which was denied, without written opinion; thereby destroying the defense and bar of res judicata, or rendering same of no force and effect as a defense to Petitioner's claim for relief herein. In view of the fact that Petitioner had been denied leave to file such amended and/or supplemental pleadings, setting out his Federal rights and how he had been denied same throughout the State proceedings and judgments of the State Courts then under the Federal Rules of Civil Procedure such answer and reply could and should be treated as a supplemental complaint to Petitioner's bill of complaints for the purposes of this hearing. The Court of Appeals, inadvertently overlooked the fact, that this hearing was had upon the basis of Petitioner's second amended original petition (bill of com-

plaints) (Tr. 25-44), leave granted to file same February 1, 1956, by Judge R. E. Thomason (Tr. 44), the motion of some of respondents to dismiss Petitioner's complaint as filed on the 17th of January, 1958 (Tr. 75-106), and upon Petitioner's answer and reply to respondents' said motion to dismiss (Tr. 106-127).

PRELIMINARY STATEMENT

Petitioner, for purposes of this petition wants to emphasize, and therefore states it to be a fact that he does not accept any statement of facts, or any findings of facts, as made by the Courts below, except such facts as are hereinafter expressly admitted. Petitioner takes a position directly in opposition to most of the statements as made by the Court of Appeals as to what the real state of facts and state of proceedings were in the trial court and in the Court of Appeals. Neither does Petitioner agree with the Courts below, as to their findings, as set out in the respective judgments, decisions and opinions and certainly does not agree with the lower courts, as to the applicable law to the issues in this case.

Petitioner's claim for relief was a legal action in Texas statutory form of trespass to try title. (Tr. pp. 25-44), and for damages (Vernon's Texas Statutes, Art. 7364, Texas Rules Civil Procedure 783, et seq., defenses see Rules 788-789), with an alternative plea, (Tr. pp. 27-44), pleading certain mat-

ters specially with reference to this title, such special matters being plead only in the alternative.

The title involved was a one-third (1/3) undivided interest in and to all of the oil, gas and other minerals in, on and under, and which have been produced and may hereafter be produced from Sections One (1) and Two (2) and the East 350 acres of Section Twelve (12), all in Block Forty-one (41), Township 2 South, T. & P. Ry. Co. Survey, Midland County, Texas—totaling 1630 acres of land, more or less—of a probable value of $5,000,000.00. Severance of the minerals from the surface estate occurred in March 1930, by mineral deed. Nothing occurred to reduce the minerals to possession, by production, until the latter part of the year 1954 when the first producing oil well was drilled.

Petitioner filed this suit on or about the 22nd day of April, 1955, (Tr. p. 7), in the United States District Court for the Western District of Texas; thereafter on or about the 1st day of February, 1956, (Tr. pp. 25-45), Petitioner filed his second amended petition in this cause in the nature of two counts: First, Petitioner alleged his claim for relief in Texas Statutory form of trespass to try title and for damages; Second, Petitioner plead in the alternative special matters as to his title.

Petitioner first invoked the jurisdiction of the United States District Court for the Western District of Texas, Pecos Division, on the grounds of diversity of citizenship; U.S.C. Tit. 28, Sec. 1332;

Tit. 28, U.S.C.A., Sec. 1332, and that the cause of action, involved the title to real property which was located and situated in the Pecos Division of the United States District Court for the Western District of Texas and for damages in the sum of more than $500,000.00, and annual rentals. Then later, after the Supreme Court of the United States denied Petitioner's petition for writ of certiorari, without written opinion, in Cause No. 814, styled *J. M. Chandler vs. J. (Jerome) O. Brown, et al;* 356 U.S. 930; 2 L. Ed. 2nd 761; 78 Su. Ct. 773., Petitioner did then, and has at all times thereafter, and is now insisting upon the additional grounds for jurisdiction for District Court of the United States, for the Western District of Texas, Pecos Division, the fact, or facts that a Federal question, or rather Federal questions, are involved in this law-suit in that Section I of the 14th Amendment to the Constitution of the United States is involved, since Petitioner has been denied his civil rights and equal protection of the laws of the State of Texas, and has been deprived of his property, property rights and vested rights, all in violation of the guarantees and prohibitions of said Sec. I of the 14th Amendment to the Constitution of the United States, and that Petitioner has been denied both procedural and substantive due process of law by the arbitrary, discriminatory, and confiscatory summary proceedings in and through the Courts of the State of Texas, in violation thereof. The Petitioner had exhausted his remedies by proper methods of appeal and/or review through the State Courts, and had filed his said petition for writ of certiorari in this

Honorable Court, which was denied, without written opinion.

Some of the respondents had filed motions to dismiss Petitioner's bill of complaint or his claim for relief. After the Supreme Court of Texas had refused Petitioner's application for writ of error, and denied his subsequent motion, or motions for rehearing, these respondents then filed a new and combined motion to dismiss setting up only the plea of res judicata, (Tr. pp. 75-104), and abandoned their earlier motions to so dismiss. This last motion to dismiss was so filed January 17, 1958, and this motion to dismiss was the only motion presented by respondents to the Court upon the hearing, (Tr. pp. 149 and 156), and therefore is the only motion which the Trial Court should have considered and had the authority to consider on such hearing to dismiss the Petitioner's bill of complaint. Petitioner filed his answer and reply to such motion to dismiss, (Tr. pp. 106-127), setting up the Federal questions, as hereinabove set out, and thereby injected into this lawsuit and brought in the Federal questions by involving his Federal rights under said Sec. I of the 14th Amendment to the Constitution of the United States in such a manner that same conferred the additional jurisdiction upon the Trial Court under Tit. 28 U.S.C. Sec. 1331, Tit. 28 U.S.C.A. Sec. 1331.

Respondent, J. (Jerome) O. Brown, had during his lifetime, some years prior to the hearing, filed

a motion for summary judgment, (Tr. pp. 52-57). Petitioner had filed his verified controverting answer and affidavit in reply to Brown's said motion for summary judgment, (Tr. pp. 58-69). Upon the hearing of the motion to dismiss, the Trial Court erroneously sustained the motion to dismiss and granted summary and affirmative relief even though respondent J. (Jerome) O. Brown had abandoned and waived his motion for summary judgment by not presenting and urging same to the trial court.

At the time of the hearing, and at the time the Trial Court granted summary judgment, said respondent, J. O. Brown, was dead, and had been dead more than two years. Trial Court had been apprised of this fact, in open Court, by Counsel for respondents, and Petitioner had filed motions to dismiss the motion of J. O. Brown for summary judgment, (Tr. pp. 128-131), and to dismiss J. O. Brown and El Capitan Oil Company as movants from the motion to dismiss, (Tr. pp. 131-136), setting up the death of J. O. Brown, on the one hand, and the dissolution of El Capitan Oil Company, formerly a private Corporation, on the other hand, and in the alternative to abate such motion until said respondent's heirs, successors, heirs at law, assigns, and/or legal representatives, could be determined and by proper procedure brought into this lawsuit and substituted for said named Defendants.

These motions were erroneously overruled by the Trial Court. Petitioner had filed motions pursuant to rule No. 12 of Texas Rules of Civil Procedure, requiring Attorneys in the case who were purport-

ing to represent said respondents to show by what authority they were further purporting to represent the said respondents, to-wit, the dead man J. O. Brown, and the ostensible private Corporation, El Capitan Oil Company, which had prior to said hearing been dissolved.

The Trial Court rendered judgment (Tr. pp. 192-196), dismissing Petitioner's bill of complaint and claim for relief, with prejudice, and granted affirmative relief to all respondents, even though no respondent had filed any pleadings seeking affirmative relief, with the possible exception of the motion for summary judgment by respondent, J. O. Brown, deceased, who had died long prior to the hearing, and this motion was abandoned and/or waived by respondents. Petitioner duly, properly, and timely gave notice of appeal from said erroneous and unauthorized judgment of the Trial Court, and prosecuted his appeal to the United States Court of Appeals, 5th Circuit, which Court entered its judgment and decision on the 2nd day of September, 1960, affirming the judgment of the trial Court. Petitioner thereafter to-wit on the 22nd day of September, 1960, filed his petition for rehearing in said Circuit Court. The Court of Appeals entered its order, overruling and/or denying Petitioner's said Petition for Rehearing on the 4rd day of October, 1960, on which day and date its judgment became final.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the Court of first instance is based upon the fact, or facts, as follows:

1. In this suit, as originally instituted, in the United States District Court, Federal jurisdiction was invoked and based on Title 28, U.S.C., Sec. 1332. Title 28, U.S.C.A., Sec. 1332, on diversity of citizenship.

2. After this Court had denied writ of certiorari in the case of *Chandler vs. Brown, et al*, 356 U.S. 930; 2 L. Ed. 2d 760; 78 S. Ct. 773, without written opinion, Petitioner did then, and at all times thereafter, has claimed additional Federal jurisdiction in this case in the Trial Court, under Title 28, U.S.C., Sec. 1331; Title 28, U.S.C.A., Sec. 1331, since numerous Federal questions became involved and have so remained. The grounds for this additional jurisdiction is fully set out and alleged in Petitioner's answer to Defendant's motion to dismiss, (Tr. 106-127).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF CIVIL PROCEDURE, BOTH FEDERAL AND STATE, CONSTITUTIONAL PROVISIONS OF THE STATE OF TEXAS, STATUTES OF TEXAS AND OTHER REGULATIONS INVOLVED ARE SHOWN AS APPENDIX "E," ATTACHED HERETO.

Section I of the 14th Amendment to the Consti-

tution of the United States, (Appendix E, p. 94), being the real issue as to Petitioner's federal rights claimed to have been denied and violated in and throughout the State proceedings in the case styled *Chandler vs. Brown, et al, supra*, terminating in this Court, by denial of writ of certiorari.

The 5th and 7th Amendments to the Constitution of the United States (Appendix E, p. 93), are involved in that Petitioner contends he has been denied the federal rights guaranteed to him by said amendments, individually and in separate particular manners by the judgment of the United States District Court and the Court of Appeals, in approving and sanctioning, said District Court judgment, by affirming it.

It involves Federal Rules of Civil Procedure, which are set out in Appendix E on page 103-106.

Section 15 and 19 of Art. I of the Constitution of Texas (Appendix E, p. 94) are also involved.

Texas Revised Civil Statutes, and Texas Rules of Civil Procedure, which are involved herein directly or indirectly, are shown in Appendix E, 95-103.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Some of the reasons and grounds relied upon for certiorari like the "Questions Presented," cannot be

framed, adequately, without reference to this Court's prior action in the case styled, *J. M. Chandler vs. J. (Jerome) O. Brown, et al*, 356 U.S. 930; 2 L. Ed. 2d 761; 78 S. Ct. 773, in which case this Court denied Petitioner's application for writ of certiorari; without written opinion.

I. The Court of Appeals in holding in its judgment and decision, and in ruling that Petitioner's claim for relief is res judicata by reason of the state proceedings and judgments of the State Courts in the case of *Chandler vs. J. (Jerome) O. Brown, et al, supra*, terminating in this Court, by denial of Petitioner's application for writ of Certiorari, without written opinion, and in further holding that the Court below correctly decided this issue, did so in violation of and contrary to the applicable decisions of this Court.

A Federal question is involved in this lawsuit, in that, Petitioner has been denied his civil rights and equal protection of the laws of the State of Texas and has been deprived of his property, property rights and vested rights without due process of law in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States. Petitioner had timely and sufficiently raised this question in valid pleadings in the United States District Court, (Tr. pp. 106-127), long prior to the hearing on respondents' motion to dismiss. Furthermore, Petitioner had laid a proper predicate for his resort to the United States District Court for relief from the wrongs, injuries

and damages, which he had suffered by reason of the wrongful, erroneous and/or unauthorized summary proceedings in, and judgments of, the State Courts, by filing in this Court his petition for writ of certiorari, which was denied, without written opinion, in Cause No. 814, styled, *J. M. Chandler vs. J. (Jerome) O. Brown, et al*, 356 U.S. 930, 2 L. Ed. 2d 761; 78 S. Ct. 773, thereby destroying the defense of res judicata and/or rendering such defense inapplicable and of no force and effect to Petitioner's claim for relief as involved in this lawsuit.

Petitioner is, for all practical purposes, in accord with the Court of Appeals' holding or finding that the main question before it was whether the District Court erred in deciding that a judgment rendered by a State Court of Texas was res judicata of the claim here sued on . . . . We think the case presented is a simple one . . . .

Where Petitioner parts company with the Court below is on its further holding and finding that the Court below decided this question correctly and further holding that Petitioner's claim for relief, as set out herein, is res judicata by reason of the suit which terminated in this Court by denial of certiorari in the case of *Chandler vs. Brown et al, supra*, without written opinion. The result of such holding is so inherently wrong and involves such thoroughgoing disregard of principles, heretofore established by this Court, as to call for review of the ruling below.

The Circuit Court held in effect that the denial of certiorari in said case was an affirmance of the State Court decisions and/or equivalent thereto, and further held that Petitioner's assertion of his federal rights as guaranteed to him by Section I of the 14th Amendment to the Constitution of the United States, were devoid of merit. Such holding being in violation of, in conflict with, in opposition to, and contrary to the applicable decisions of this Court. The Court of Appeals was in error in affirming the erroneous and unauthorized judgment of the United States District Court, which judgment erroneously dismissed Petitioner's bill of complaint and claim for relief, with prejudice and *attempted to deny to Petitioner the right to further prosecute his claim for relief.* The Trial Court stating in his judgment, (Tr. pp. 195-196), the following:

> **"That Plaintiff's suit and cause of action alleged and asserted herein against defendants be, and the same is, finally dismissed with prejudice to Plaintiff's rights to refile or FURTHER PROSECUTE THE SAME." (Emphasis ours)**

The Court of Appeals should have reversed and rendered this cause in favor of Petitioner and in the alternative certainly the Court of Appeals should have reversed and remanded this cause to the trial Court with instructions to proceed with a trial of the case, on its merits, as the law directs in such cases. The fact that the defense of res judicata has no appliication to Petitioner's claim for relief was raised by Petitioner in his answer and reply to

the motion to dismiss (Tr. 106-127). Petitioner also denied in said answer and reply that the defense of res judicata existed in this cause and created a valid defense or bar to petitioner's claim for relief (Tr. 125-126). Petitioner also denied each and every allegation as contained in respondents' motion to dismiss as filed by them on the 17th day of January, 1958, except such matters as were expressly admitted or approved in said answer and reply (Tr. 126). Petitioner strongly urged and argued before the trial Court upon the hearing of such motion to dismiss and Petitioner's answer and reply thereto that his claim for relief was not res judicata, due to the fact that he had prosecuted his appeals through the State Courts and had then filed his application for writ of certiorari in this Court in the case of *Chandler vs. Brown, supra*, which application was denied without written opinion. Petitioner set out his points on appeal (Tr. p. 208, Nos. 1, 2, 3 & 4; Nos. 7 & 8, p. 209, and No. 26 p. 213) why the defense or bar of res judicata had no application to his claim for relief. Petitioner developed and urged the inapplicability of the defense of res judicata to his claim for relief in his brief filed in the Court of Appeals. Under the decisions of this Court Petitioner was and is entitled to resort to a proper Federal District Court to have his cause tried on its merits, since he has created, completed and laid a proper predicate therefor, by exhausting his remedies for relief from the erroneous and unauthorized summary judgment as rendered in the State Court by duly, timely, and properly prosecuting his appeals through the State

Courts and then prosecuting his application for writ of certiorari in this Court, which was denied, without written opinion.

In the case of *Atlantic Coast Line R. Co. vs. Powe* 283 U.S. 401 p. 404; 75 L. Ed. 1142; 51 S. Ct. 498, this Honorable Court in passing upon the effect of a denial of writ of certiorari, on the merits of a case, made the following statement:

> "It is urged that a certiorari was denied in Central of Georgia R. Co. vs. Davis (C.C.A. 5th) 7 F 2d 169, which seemed to qualify the doctrine of the Berkshire case. But 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the (404) case, as the bar has been told many times.' United States vs. Carver, 260 U.S. 482, 490; 67 L. Ed. 361 p. 364; 43 S. Ct. 181."

In the case of *Daniels vs. Allen* 344 U.S. 443 p. 491, 73 S. Ct. 437 p. 438-439, at page 438 the Court said:

> "If we were to sanction a rule directing the District Courts to give any effect to a denial of certiorari, let alone the effect of *res judicata* which is the practical result of the position of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago."

Other cases decided by this Court to the same or similar effect are as follows:

Hamilton Brown Shoe Company vs. Wolf Bros. & Co. 240 U.S. 251 p. 258; 36 S. Ct. 269 p. 271; 60 L. Ed. 629 p. 634.

United States vs. Shubert 348 U.S. 222; 99 L. Ed. 279; 75 St. Ct. 277, p. 284.

Brown vs. Allen, 344 U.S. 443, p. 456; 73 S. Ct. 397, p. 407; *Rehearing denied* 345 U.S. 946; 73 S. Ct. 827.

United States vs. Carber, 20 U.S. 482, 480; 67 L. Ed. 361, 364; 43 S. Ct. 181.

State of Maryland vs. Baltimore Radio Show. Md. 1950. 70 S. Ct. 252; 338 U.S. 912; 94 L. Ed. 562.

The Court below further held that Petitioner's assertion of his federal rights, as guaranteed to him by Sec. I of the 14th Amendment to the Constitution of the United States, were devoid of merit, as set out, in the last paragraph of its opinion page 8 (Tr. p. 223), and further held that it was bound by the interpretation, construction and application of the laws applying to real estate in Texas by pronouncements as made by the Court of Civil Appeals of Texas in its opinion in the case styled, *Chandler vs. Brown et al*, 301 S. W. 2d 720. Thereby holding in effect that Petitioner's asserted federal rights are controlled by local laws and procedure, which holding is contrary to the applicable decisions of this Court, and is precisely the practice which has, on many occasions, been condemned by this Honorable Court. In regard to such practices, Mr. Justice

Holmes stated in the case of *Davis vs. Wechsler*, 263 U.S. 22, 24; 44 Sup. Ct. 13, 14, that:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

This principle has been adhered to in the cases of *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, pp. 352 and 353; 63 Sup. Ct. 1062, and the case of *Arnold v. Panhandle & Santa Fe Railway Co.* 353 U.S. 380; 77 S. Ct. 840, as well as many other cases.

It is to be kept in mind that the judgment and decision of the Court of Civil Appeals of Texas in the case of *Chandler vs. Brown et al*, 301 S. W. 2nd 720, which was cited and relied upon as the controlling authority by the Court below, was under direct attack in the case of *Chandler vs. Brown et al* 356 U. S. 930; 78 S. Ct. 773; 2 L. Ed. 2nd 761, in which certiorari was denied, without written opinion. It was and is also under direct attack in the case at bar by Petitioner's answer and reply to defendant's motion to dismiss, (Tr. 106-127).

Petitioner further agrees with the Court below in its holding or finding that all issues were decided against Petitioner by the State Courts in the State proceedings.

Where Petitioner again parts company with the

Court below is in the Court's holding or finding that there was no issue as to what transpired in the Texas Trial Courts and the Appellate Courts of Texas having affirmed what was done by the Trial Courts that it rendered Petitioner's claim for relief res judicata. As a matter of fact, the assertion of Petitioner's federal rights under Section I of the 14th Amendment to the Constitution of the United States was based upon the arbitrary, discriminatory, and confiscatory proceedings in the Trial Court of Midland County, Texas in the rendition of the erroneous, wrongful, unauthorized, and unconstitutional summary judgment. Petitioner has also attacked the action of each and every Appellate Court throughout the State proceedings, (Tr. pp. 106-127).

Petitioner further agrees with the Court below in its holding or finding that Appellant insists that he has never had a hearing on the merits of his case, (Op. p. 8; Tr. p. 223).

Where Petitioner again parts company with the Court below is in its holding or finding that the record shows that each Court he (Petitioner) has entered has dealt with him generously. The summary judgment as rendered by the District Court, Midland County, Texas, (Tr. pp. 95-97), was wholly unauthorized, erroneous and contrary to the provisions of Rule 166-A, Texas Rules of Civil Procedure, and the applicable laws and decisions of the Appellate Court of Texas. As such judgment was rendered, it was in violation of Section 15 and 19

of Article I of the Constitution of the State of Texas, as well as the Statutes and other applicable Texas Rules of Civil Procedure, namely Rules Nos. 1 and 815. It likewise denied the Petitioner his civil rights, equal protection of the laws of the State of Texas, and deprived him of his property, property rights and vested rights, without due process of law, all in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States.

The Court below found that the Court of Civil Appeals of Texas, in its opinion, and in its findings of facts, based same upon the depositions on file and especially the depositions of Petitioner. Some of the other depositions considered by the State Trial Court and the Court of Civil Appeals were the depositions of respondents, J. O. Brown, Daryl Davis and B. A. Ross. Petitioner and respondents were parties to that suit, and interested in the outcome or result of same, which fact, or facts, created within themselves genuine issues as to material facts between the parties to that lawsuit, because it was the province of the Court, on a trial of the case on its merits, or of a jury, to determine the credibility of said witnesses, (being parties interested in the lawsuit and the results of same), and the weight to be given their testimony, if any, which should have precluded the rendition of a summary judgment under all of the settled and established laws of Texas and under the decisions of this Court and the Court of Appeals for the 5th Circuit. *Sartor*,

et al vs. Arkansas Natural Cas Corporation, 321 U. S. 620; 64 Su. Ct. 724; *Whitaker vs. Coleman*, 115 F. 2d 305; *King, et ux vs. Robinsky*, 241 S. W. 2d 220 (Civ. App. 1951); *Smith, et al vs. Bolin, et al*, 271 SW 2d 92; Tex. ; *Gulbenkian vs. Penn*, 252 SW 2d 929; 151 Tex. 412; *Bessie E. Ward, et vir. vs. A. E. Stroud*, 274 SW 2d 136; *Roberson vs. All States Insurance Company*, 278 SW 2d 179; *Jindra vs. Jindra*, 267 SW 2d 287; *LeBus vs. LeBus, et al*, 269 SW 2d 506.

The Court of Appeals repeatedly referred to and relied on the opinion of the Court of Civil Appeals in *Chandler vs. Brown, et al.*, 301 SW 2d, 720, notwithstanding the fact that the Trial Court had excluded the opinion from its consideration when Petitioner had offered same in evidence for the limited purpose of showing a link in the denial of his federal rights by the State proceedings and judgments, (Tr. p. 170-171), upon the objection of respondents' attorney. Furthermore, the Texas Court of Civil Appeals erroneously, arbitrarily, and discriminatorily, and without right or authority under the settled laws of Texas attempted to make additional findings on Petitioner's appeal to support the erroneous, and unauthorized summary judgment, as rendered by the State Trial Court, and indulged every presumption in favor of the Trial Court's ruling and judgment. This again was in conflict with the settled laws of the State of Texas, applicable in such cases, and was contrary to and in conflict with the decisions of the Appellate Court of the State of Texas.

In the case of *English v. Smith Food Stores*, 289 93 S.W. 2d 792, p. 794 (Civ. App. at Fort Worth) the court in passing upon this matter made this statement:

> "The duty of the court hearing a motion for summary judgment is to determine if there are any issues of fact to be tried and not to weigh the evidence or determine its credibility. The court accepts as true all evidence of the party opposing the motion which tends to support such party's contention and gives him the benefit of every reasonable inference which properly can be drawn in favor of his opposition."

All of these matters were under direct attack by Petitioner in the case of *Chandler vs. Brown, et al, supra*, in which this Court denied petition for certiorari, without written opinion.

Petitioner further agrees with the Court below in its ruling and/or findings to the effect that it was undisputed that Appellant Chandler (Petitioner herein) appealed from the judgment of the Midland County District Court to the Texas Court of Civil Appeals, which affirmed the action of the Trial Court, and that a writ of error to the Supreme Court of Texas was (*dismissed or*) refused (N.R. E.) by it.

Where Petitioner again parts company with the Court below is on its further holding and finding that there was no issue as to what transpired in the Texas Trial Court, and the Appellate Courts of

Texas having affirmed what was done by the Trial Court and having rendered judgment prior to the one here appealed from, the State Court proceedings are res judicata of all of the questions raised by Appellant here.

Petitioner believes the Court below had inadvertently overlooked Petitioner's answer (Tr. 106-127) to respondents' motion to dismiss. Petitioner had directly attacked the summary judgment as rendered by the State District Court in his said answer to the motion to dismiss in Paragraph III (Tr. 109-117). He likewise raised the question of his federal rights, that is that he had been denied his civil rights, equal protection of the laws of the State of Texas, and had been deprived of his property, property rights and vested rights without due process of law in violation of the guarantees and prohibitions of Section I of the 14th Amendment to the Constitution of the United States (Tr. 109-110). The Petitioner repeatedly raised the question of his federal rights in this answer and just why the Court below made its ruling that there was no issue as to what transpired in the State Trial Court and no attack on the summary judgment as rendered in the State Trial Court, Petitioner is wholly at loss to understand. Petitioner raised these matters in his points on appeal and in his brief as filed in the Court below.

Under Rule 15, Federal Rules of Civil Procedure, Title 28 U.S.C.; Title 28 U.S.C.A., Petitioner's said

answer to respondents' motion to dismiss (Tr. 106-127), even though same was designated an answer it could be considered and treated by the Court as a supplemental petition, setting up what was not included in his second amended original petition as filed in the United States District Court and what had transpired subsequent to the filing of his last amended bill of complaint, to-wit: the proceedings ini the State Courts, up to and including the denial of writ of certiorari, by this Court, without written opinion, in the case of *Chandler vs. Brown et al, supra.*

2. There is a conflict in the judgment and decision of the Court of Appeals, 5th Circuit, rendered in the case at bar, and the judgment and decision of this Honorable Court in the case of *Hamilton Brown Shoe Company vs. Wolf Bros. & Co.* 248 U.S. 251, p. 258; 36 S. Ct. 269, p. 271; 60 L. Ed. 629, in that, the Circuit Court of Appeals holds that Petitioner's cause of action is red judicata, by reason of the State proceedings and judgments, and further holding, in effect, that where writ of certiorari is denied, without written opinion, by this Court, as was done in the case of *Chandler vs. Brown, et al, supra*, that it renders the proceedings, as involved therein, not only final as to the particular proceedings, but also conclusive and final of the rights of the parties, as therein involved, to the same extent and effect, and in the same manner as if this Honorable Court had considered and determined such matters, claims, and/or issues, on the merits, of an appeal and/or

writ of certiorari. While this Honorable Court definitely holds in the case of *Hamilton Brown Shoe Company vs. Wolf Bros. & Co., Inc., supra*, that the denial of a petition for writ of certiorari, without written opinion, is no expression of opinion on the merits of the case, and does not create a bar of res judicata in a later suit and/or later appeal, in the same suit, on petition for certiorari for review of the case from the final judgment rendered after trial on the merits. The judgment and decision of the Court of Appeals is also directly in conflict with the following judgments and decisions of this Honorable Court, which have approved, followed, enlarged and expanded the holding in the *Hamilton Brown Shoe Company vs. Wolf Bros. & Co., Inc., supra*, to wit: *Atlantic Coast Line R. Co. vs. Powe* 283 U.S. 401, p. 404; 75 L. Ed. 1142; 51 S. Ct. 498; *United States vs. Shubert* 348 U.S. 222; 99 L. Ed. 279; 75 S. Ct. 277 p. 284; *Brown vs. Allen*, 344 U. S. 443, p. 456; 73 S. Ct. 397, p. 407; *Rehearing Denied* 345 U.S. 946; 73 S. Ct. 827; *Daniels vs. Allen* 344 U.S. 443 p. 491; 73 St. Ct. 437 p. 438-439 L. Ed. ; *United States vs. Carver*, 260 U.S. 482, 490; 67 L. Ed. 361, 364; 43 S. Ct. 181; *State of Maryland vs. Baltimore Radio Show*. Md. 1950. 70 S. Ct. 252; 338 U.S. 912; 94 L. Ed. 562.

3. That the Court of Appeals by approving and sanctioning, by affirming the erroneous and unauthorized judgment of the Trial Court and in its holdings in its judgment and decision and in ruling that Petitioner's claim for relief was and is barred

by the defenses of laches, stale demand, estoppel, negligence, dilatoriness, etc., has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The defenses of laches, stale demand, negligence and the like have no application in Texas to a trespass to try title suit and a superior equitable title will support a trespass to try title action the same as a legal title, limitation being the defense applicable in such cases affecting real estate and covered exclusively by Statutes 5307-5523a inclusive. However, the Trial Court in rendering its summary judgment, and the Court of Appeals in its opinion, have held that Petitioner is barred from the recovery of his property, his property rights, and vested rights by reason of these defenses.

Such holding and decision is a departure from, contrary to, in conflict with and not in accord with the accepted and usual course of judicial proceedings of the State of Texas, as well as the federal decision passing upon these issues as applied to Texas real property. The rule of law as announced in Texas Jurisprudence as applicable to the case at bar, states clearly the inapplicability of such defenses as laches, stale demand, etc., in an action involving the title to real property in Texas.

27 Texas Jurisprudence, p. 21
as follows:

"Sec. 4. . . . While an action of trespass to try title may be maintained upon equitable as well as upon a legal title, the doctrine of laches or stale demand does not apply to an executed title which differs only in formal respects from a strictly legal title."

In the case of *Higgins Oil & Fuel Co. v. Snow*, 113 F. 433, which was decided by the Court of Appeals, for the 5th Circuit, set out that it is a settled rule of property in the State of Texas that the defenses of laches, stale demand, and the like, have no application to suits for the recovery of real estate in Texas, and in passing on this question (p. 436) said:

"The first question presented has been frequently decided by the Supreme Court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, capable of being established at law, the doctrine of laches and stale claim does not apply. It is simply a question of adverse possession. San Patricio Corp. v. Mathis, 58 Tex. 242; Moss v. Berry, 53 Tex. 632; Williams v. Conger, 49 Tex. 602; House of Brent, 69 Tex. 30, 7 S. W. 65; Lumber Co. v. Pinchard (Tex. Civ. App.), 23 S. W. 723; Land Co. v. Ryland (Tex. Civ. App.), 28 S. W. 206. And, though sitting in equity, this court may follow the rule of decision in the State court on the question of limitation and laches. Balkarn v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 331; Again, since the complainant could go into a court of law and establish her title, and then come to this court for the desired equitable relief, there is no reason why she should be denied it in the first in-

stance. In cases, thus, of concurrent jurisdiction, equity follows the law, and a court of equity will consider itself bound by the same rules that would apply in a court of law. Godden v. Kimmel 99 U.S. 201, L. Ed. 431; Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 US 448, 13 S. Ct. 944, 37 L. Ed. 799; Reugen v. Sabin, 3 C.C.A. 578, 53 Fed. 420; 11 Am. & Eng. Enc. Law 476."

The Fifth Court of Appeals clearly announced the settled rule of property in Texas as to the inapplicability of such defenses as laches, stale demand, etc. Such questions have been passed on numerous times by the courts of the State of Texas, including many decisions by the Supreme Court of Texas. In the case of *New York & Texas Land Co. Limited v. Hyland, et al*, 28 S. W. 206, p. 211, the Court in passing upon the question of laches, stale demand and the like, gave a rather full and complete history of the Statutes of Limitation in Texas, relating to real estate, giving the reason why they control and are exclusive as to suits affecting real property in Texas, especially suits, not only involving the legal title, but also, suits involving wholly equitable titles. It also covers, fully, the reasons why such defenses, as stale demand, laches and the like cannot and do not apply to actions for the recovery of real property in Texas. To the same or similar effect are the following Texas cases, to wit *Williams v. Conger, et al*, 49 Tex. 582, p. 602; *Moss v. Berry, et al*, 53 Tex. 632, p. 633; *Satterwhite v. Rosser, et al*, 61 Tex. 166, p. 172; *Duren, et al v. Houston & T. C. Ry. Co., et al*, 86 Tex. 287, p. 291;

24 SW 258, p. 259; *Wooldridge v. Hancock*, 70 Tex. 21; 6 S. W. 818, p. 821; *Loomis, et al v. Cobb*, 159 S. W. 305; *Gagle, et al v. Sabine Valley Timber & Lumber Co.*, Tex. , 202 SW 942, p. 943; *Holmes v. Tennant*, 231 SW 313; and *Cox v. Piwonka*, 257 SW 2d 955, p. 958.

4. The Court of Appeals, by approving and sanctioning, by affirming the judgment of the Trial Court and in holding that Petitioner's claim for relief was and is barred by the four year Statute of Limitations, being Article 5529 of the Revised Texas Statutes, specifically excludes, on its face, that it applies to actions, "for the recovery of real estate, in Texas," has resulted in deciding an important State question in a way in conflict with applicable State law.

The four year statute of limitations by expressed terms, on its face, excludes its application to actions "for the recovery of real estate." Said statute, being very brief, is as follows:

> Revised Civil Statutes of Texas, Art. 5529 (5690) (3358) (3207) All other actions barred, when; every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

The above article, 5529, has no application, whatsoever, to Plaintiff's cause of action and bill of com-

plaint. *Carl vs. Settegast*, 237 SW 238 (241) *Opinion adopted as that of Supreme Court* (243).

This action is governed exclusively by Articles 5507-5523a and Texas Rules of Civil Procedure, Nos. 783-805.

Remembering, however, that the title here involved is an undivided one-third mineral interest in and to the oil, gas and other minerals, Petitioner points out that in connection with minerals which have been severed from the surface by conveyance of the minerals or reservation of same, there is a difference in the application of the Statutes of Limitation and adverse possession in so far as same apply to the surface and as they apply to the severed minerals estate. In the case at bar the mineral estate was severed from the surface estate by mineral deed from C. M. Pynes to J. O. Brown, in trust for petitioner, J. M. Chandler, dated March 3, 1930, and the severance of the estates has so remained down to the present time.

A leading case with reference to these severed estates is *Harris vs. Currie*, 142 Tex. 93; 176 SW 2d 302, and the authorities there cited, holding that the owner of the entire estate may convey the minerals separately from the surface or that he may convey the surface separately from the minerals; that the owner has the right to sever his land into two estates. Other Texas cases holding to the same or similar effect are: *Texas Company vs. Dougher-*

ty, 107 Tex. 226; 176 SW 177; *Humphreys-Mexia Co. vs. Gammon*, 113 Tex. 247; 254 SW 296.

The Harris case, supra, is also authority for the proposition that such a severance may occur either by conveyance of the minerals alone or by conveyance of the land with the reservation of the minerals. The same case also holds that when the mineral estate of the land has been severed from the surface of the land, two separate and distinct estates exist, each of which has all of the incidents and attributes of an estate in land, and cites: *Lemar vs. Garner*, 121 Tex. 502, 50 SW 2d 769; *Munsey vs. Mills & Garitty*, 115 Tex. 569, 283 SW 754; *Lodwick Lumber Co. vs. Taylor*, 100 Tex. 270, 98 S.W. 238; 31 Texas Jurisprudence p. 556-558, incl.

After the mineral estate and surface estate are severed, and it is not necessary for the whole of the mineral estate to be severed from the surface, then the Statutes of Limitation and adverse possession as affecting the mineral estate are altogether different from the statutes of limitation and adverse possession as affecting surface estate. Adverse possession of the minerals which is necessary to set the Statutes of Limitation in operation is the reduction of the minerals, as such, to the possession of the adverse party, as the actual producing of oil, gas or other minerals. *Lyle vs. Dodge*, 228 SW 316, *no writ history; Wallace vs. Hoyt*, 225 SW 425, *error refused; Elliott vs. Nelson et al*, 113 Tex. 62; 251 SW 5011 *Grissom vs. Anderson et al*, 125 Tex. 26; 79 SW 619, 621; *Saunders vs. Hornsby*, 173 SW

2d 795, *error refused; Carminta vs. Fenagle*, 267 SW 2d 449; *Green vs. White*, 137 Tex. 361, 153 SW 2d 575, 136 ALR 626; *Barr vs. Wall*, 265 SW 2d 208; *Hanks vs. Magnolia Petroleum Co.*, 14 SW 2d 348, p. 353, *affirmed* 24 SW 2d 5; *King vs. Hexter*, 200 F. 2d 807; 25 Texas Law Review, pp. 145-153; 26 Texas Law Review, pp. 108-109.

It is absolutely necessary to plead limitation as a defense in a suit involving title to land (Rule 789, Texas Rules of Civil Procedure). It is also necessary to plead and prove adverse possession in a trespass to try title suit.

5. The Court of Appeals in holding in its judgment and decision and in ruling that the Court below correctly treated this action as being before it upon motions for summary judgment as to all of the Appellees, all of them including in their motions matters outside the pleadings; all of the parties proceeded in the presentation of the case to the court below upon the assumption that the matter was being heard upon motions for summary judgment, has decided a question of federal law, in a manner directly in conflict with the express provisions of the authority under which it purported to act, to wit, Rule 12(b)(6), Federal Rules of Civil Procedure, Title 28 U.S.C., and has thereby so decided such federal question which has not been but should be settled by this Court.

The Court below, by its statement as above made.

and by the reference in its footnotes, was attempting to say that the trial Court, in granting summary and affirmative relief to respondents, who had no motion or pleadings seeking such summary or affirmative relief, treated the motion to dismiss as a motion for summary judgment, since matters outside the record were presented to the Court, under the authority of Rule 12(b)(6), Federal Rules of Civil Procedure, Title 28 U.S.C.: Title 28 U.S.C.A., but the Court below was in error, as to three major issues in such ruling, to wit: (1) There were numerous matters presented to the Court, *which were excluded by the Court*, thereby precluding the trial court from treating the motion to dismiss as a motion for summary judgment; (2) the judgment of the trial court shows on its face that the trial court's action in granting summary and affirmative relief herein, was not assumed to exist by the trial court by reason of said Rule 12(b)(6) but that the Court purported to grant such summary and affirmative relief on motions for summary judgment, theretofore, made by defendants. This, of course, has no basis and support in the record. All motions were abandoned and/or waived by respondents except the motion to dismiss as filed on January 17th, 1958, and the Court in its own statement (Tr. 149) called said motion for a hearing and this was the only motion which he did recognize as being before him and the only motion which respondents presented as shown by statements of respondents' attorney, F. H. Pannill (Tr. 141, 149, 154-155, 156); and (3) there is absolutely nothing in the record of this case to

support the statement as made by the Court below to the effect that all parties proceeded on the hearing on the assumption that it was a motion for summary judgment. The direct opposite state of facts existed, as to the Court, counsel for all respondents and counsel for Petitioner upon the hearing at which the judgment in question was so rendered by the trial court.

The Court below doubtless inadvertently overlooked the fact that most of Petitioner's offers in evidence were presented to *but excluded by the Trial Court*, thereby precluding the treatment of the motion to dismiss as a motion for summary judgment. The Court excluded Petitioner's offers in evidence of both the transcript of the proceedings in the District Court of Midland County, Texas, No. 6390, styled, J. M. Chandler vs. J. O. Brown, et al, and also the Court Reporter's "Statement of Facts" of the proceedings had in the State Court on the hearing for summary judgment therein, (Tr. p. 165-166), which Petitioner offered in evidence for the limited purpose of showing how, when and where Petitioner had been denied his civil rights, equal protection of the laws of the State of Texas, and had been deprived of his property, property rights and vested rights without due process of law, all in violation of the guarantees and prohibitions of Sec. 1 of the 14th Amendment to the Constitution of the United States (Tr. 158) and in connection therewith to show the many genuine issues that did exist at the time of the summary proceedings in the state trial court.

Many other offers in evidence were made by Petitioner for the same limited purpose, and were likewise *excluded by the trial court* on the hearing of the motion to dismiss, some of which are as follows:

> Petitioner's brief in Cause No. 5195 in the Court of Civil Appeals for the 8th Supreme Judicia District of Texas in the case of Chandler vs. Brown, et al, (Tr. p. 167).
>
> Petitioner's motion for rehearing, (Tr. p. 168). Judgment and opinion of Court of Civil Appeals, the opinion being reported, Vol. 301 SW 2d 720.

There were many other offers, as shown on pages 171, 172, 173, et seq. All of these offers in evidence by Petitioner were made for the limited purpose as stated on page 158 of the Transcript. Since the many offers in evidence were presented by Petitioner to the Court and were excluded from evidence by the Court, it precluded the rendition of a judgment granting summary relief on a motion to dismiss.

There is nothing in the record to support the statement of the Court below, that all parties proceeded upon the hearing on the assumption that the matter was being heard upon the motion for summary judgment. The direct opposite position and assumption to that stated by the Court below was true as to the parties upon the hearing. The only motion presented by respondents was the motion to dismiss petitioner's bill of complaint and claim for relief

which respondents filed on the 17th of January, 1958, (Tr. p. 75-103). Mr. Pannill, who was appearing for all respondents at the hearing in the District Court, made the following statements, and it is to be kept in mind that he was the only attorney appearing for the respondents at the hearing, such statements being as follows:

> ". . . . . so what is to be gained, we would ask, by at this time filing a whole new wad of lengthy pleadings and getting out some new summons and bringing some new parties into this Court when after they get here all they are going to do is urge the same defenses that we have here, *res judicata*. For that reason we oppose Mr. Chandler's motion for leave to file amended pleadings." (Tr. p. 141) (Emphasis ours)

> "The Court:
>
> All right, then, we now go to your motion (Addressing Mr. Pannill), which the Court feels is the material and determinative things to be considered here now at this stage of this lawsuit." (Tr. 149)

> "Mr. Pannill:
>
> Yes, sir. This motion was filed back in January of 1958 and has been brought to the attention of the Court to succeeding sessions of this Court at Pecos." (Tr. 149)

> "Now, those are his Constitutional rights and his civil rights, as I understand it, which he claims have been violated. We have filed in this Court, to summarize this thing and get it

down briefly, a Motion to Dismiss which is (in) essence is a plea of judicata technically, I guess, it would go to the lack of jurisdiction of this Court any longer over the subject matter of this suit." (Tr. pp. 154-155).

"We think our Motion is good. We think that—We have no extensive authorities to cite because we think the proposition is so well settled the Court would know it and nobody would doubt it." (Tr. p. 155).

At the time Counsel finished with his statements, he definitely established the fact with his closing remark to the Court, that the motion as filed by respondents on the 17th of January, 1958, was the only motion which he had presented and was urging before the Court by making the following statement, which was also his closing statement as he rested which is as follows:

"We respectfully ask, Your Honor, to sustain our Motion and enter judgment dismissing this Complaint and the Cause of Action. Thank you." (Tr. p. 156)

It is true that the judgment recites that all motions filed by respondents were granted and sustained, but Petitioner believes that such recitations were nothing more than an afterthought of respondents' counsel in preparing the judgment for the Court. Petitioner never had the opportunity to see a draft of the judgment until the morning same was entered. He immediately called the District Judge, Honorable R. E. Thomason at El Paso, Texas, and

was advised by the Court's Secretary that Judge Thomason was not available to call to the telephone and when Petitioner then announced he would talk to her she advised him in the telephone conversation that Judge Thomason had already signed the judgment and handed same to the Clerk for entry on the minutes.

The wrongful inclusion in the judgment, that all motions filed by respondents were granted and sustained, when only the motion filed by respondents to dismiss on the 17th day of January, 1958, was presented to the Trial Court, as the record clearly shows, was extremely prejudicial, erroneous and unauthorized by all federal laws and rules of procedure. Respondents had waived all of the other motions as shown by the statements of counsel for said respondents as above quoted, and furthermore had waived same by their failure and/or refusal to present, urge and insist on such motions to the Trial Court at the hearing.

In view of the facts, as above set forth, there is this additional reason for granting a writ of certiorari in this cause because the Court of Appeals in holding, in its judgment and decision, by affirming the erroneous and unauthorized judgment of the Trial Court that all of the parties proceeded in the presentation of the case to the Court below upon the assumption that the matter was being heard upon motion for summary judgment, has, "so far departed from the accepted and usual course of ju-

dicial proceedings, or so far sanctioned such a departure by the lower Court, as to call for an exercise of this Court's power of supervision."

6. That the Court of Appeals, in approving and sanctioning, by affirming the Trial Court judgment and in holding in its judgment and decision and in ruling that Petitioner's claim for relief was and is res judicata by reason of the summary judgment rendered by the State Court of Texas when Petitioner has exhausted his remedies by direct appeals or reviews by writ of error through the Appellate Courts of Texas, including the Supreme Court of Texas, being the Court of last resort in Texas, and had then filed his petition for writ of certiorari in this Court which was denied without written opinion, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Due to the similarity and basic grounds for this reason for granting certiorari and the grounds and reasons as set out as Petitioner's number one reason for granting certiorari, Petitioner does hereby adopt, by reference, the statements and the arguments together with the authorities as cited under his reason number one, as a part of this his reason number six for granting Certiorari, to the same extent and in the same manner as if herein repeated word for word.

7. The Court of Appeals, in holding in its judgment and decision and in ruling that it was bound by the holdings of the Courts of Texas as to Texas real property law and as to limitations and further holding, in effect, that the opinion of the Court of Civil Appeals of Texas rendered in the case of *Chandler vs. Brown et al*, 301 SW 2d, 720 was the law of Texas on real property and limitation being the opinion rendered in such state proceedings which were under direct attack by Petitioner, in the case at bar, as denying him his Federal rights guaranteed to him by Sec. I of the 14th Amendment to the Constitution of the United States, has decided the case at bar on principles which are in violation of and contrary to the applicable decisions of this Court.

Furthermore the Court below has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

The judgment and decision of the Court of Civil Appeals in the case of *Chandler vs. Brown, et al*, 301 SW 2d 720, was and is under direct attack in the case at bar by Petitioner as being contrary to, in conflict with, in opposition to and not in accord with the settled and established laws of the State of Texas pertaining to real property. This being one of the claims made by Petitioner of his federal rights in the United States District Court, that by the very judgment and decision, as relied upon by the Court

below, petitioner had been denied his civil rights, equal protection of the laws of the State of Texas, and had been deprived of his property, property rights and vested rights in violation of the guarantees and prohibitions of Sec. I of the 14th Amendment to the Constitution of the United States. Petitioner having asserted his said federal rights in clear and unmistakable language in his answer to respondents' motion to dismiss his bill of complaint, (Tr. 106-127), which was a valid and subsisting pleading at the time of the hearing, which Petitioner duly presented to the Trial Judge, and was considered by the Trial Judge, was sufficient to inject into the case at bar Petitioner's claim to his federal rights, as so asserted. Even though such pleading was designated Petitioner's answer to respondents' motion to dismiss, under the rules of Civil Procedure and the applicable decisions of this Court, and in order that justice might be done, such answer, for the purposes of that hearing, could have been and should have been considered a supplemental bill of complaint, as well as an answer. As a matter of fact in Petitioner's prayer to said pleading (Tr. pp. 127) he asked that same be considered as a bill of complaint, as well as an answer.

Petitioner having asserted his federal rights, as guaranteed to him by Sec. I of the 14th Amendment to the Constitution of the United States, same are not to be defeated under the name of local law or local control. This principle of law is clearly stated in the quotation, heretofore set out, from the opinion in the case of *Davis vs. Wechsler*, 263 US 22,

24; 44 S. Ct. 13, 14. The same principle of law is announced by this Court in the cases of *Bailey vs. Central Vermont Ry. Co.*, 319 U.S. 350, 352; 63 S. Ct. 1062; and *Arnold vs. Panhandle & Santa Fe Railway Co.*, 353 US 380; 77 S. Ct. 84.

8. There is a direct conflict in the judgment and decision of the Court of Appeals as rendered in the case at bar and a former judgment and decision as rendered by the same court, in the case of *Higgins Oil & Fuel Co. vs. Snow*, 113 Fed. 433; in that the District Court in its judgment erroneously held that Petitioner's claim for relief was barred by laches, stale demand, estoppel, etc. and the Court below approved and sanctioned such erroneous holdings by affirming the judgment of the Trial Court, which dismissed Petitioner's claim for relief, with prejudice, and granted affirmative relief to respondents on the erroneous theory that Petitioner's claim for relief was so barred by laches, stale demand, estoppel, and the like. While in the case of *Higgins Oil & Fuel Co. vs. Snow, supra*, the Court below in an exhaustive opinion citing numerous authorities of both the Federal Courts and the Appellate Courts of Texas, including many decisions of the Supreme Court of Texas, clearly and unmistakably announced that it is a settled rule of property in Texas that such defenses, as laches, stale demand, dilatoriness, etc. have no application to suits involving the title to land in Texas. The quotation heretofore made from the opinion in the case of *Higgins Oil & Fuel Co. vs. Snow, supra*, p. ... is hereby adopted,

by reference, as constituting a part of the explanation for this reason for granting certiorari.

It is true that these conflicting judgments and decisions were rendered by the same Court of Appeals, but, in view of the fact, that the prior judgment and decision, as rendered in *Higgins Oil & Fuel Co. vs. Shaw, supra,* follows the settled and applicable law of Texas on the questions involved, while the judgment and decision of the Court below, as rendered in the case at bar, which was rendered many years later, is in conflict with the applicable State law. The lower Court by its judgment and decision in the case at bar having so far departed from the accepted and usual course of judicial proceedings should invite this Court to exercise its power of supervision, to the same extent and in the same manner as if there existed a conflict in the judgments and decisions of the Courts of Appeals of different Circuits.

9. The Court of Appeals, in holding in its judgment and decision and in ruling that summary relief was proper, in the case at bar, and in approving and sanctioning the summary judgment, as rendered by the trial court, by affirming same, is in square conflict with the decision of this Court in the case of *Sartor, et al vs. Arkansas Natural Gas Corporation*, 321 US 620; 64 S. Ct. 724.

The United States District Court in its judgment as rendered herein held that Petitioner's claim for

relief was barred, not only by the defense or bar of res judicata, but also that same was barred by (1) the four year Statute of Limitations of Texas, (2) laches and stale demand, and (3) estoppel. Texas' four year statute of limitations has no application to suits for the recovery of title to real property in Texas, as evidenced from its clear and expressed terms, but if same did apply, or any other law of limitations did apply in this case, same would create genuine issues between the parties as to material facts, in this law suit, as to when limitations started to run, in what manner it was set in operation, and if proper notice of such claim of limitations, either actual or constructive, had been served upon Petitioner. Limitations, if rightly applied, would carry with it all questions of adverse possession, which are many. These questions likewise would create genuine issues in this lawsuit. The defense, of any of the other defenses such as laches, stale demand and/or estoppel, likewise injects many genuine issues to be determined upon a trial of the cause, on its merits. Furthermore, the burden was upon the respondents to show the non-existence of any genuine issue, as to a material fact between the parties to this lawsuit. This respondents failed to do; but, instead injected the above mentioned genuine issues into this lawsuit themselves in the judgment which they persuaded the trial Court to enter in this cause (Tr. 192-196). In addition to the genuine issues, as just enumerated, there were many genuine issues apparent from the face of the pleadings on file in this cause at the

time of the hearing. Petitioner's second amended original petition (bill of complaint) (Tr. 25-44) and the respondents' answers (Tr. 48-52) on file, showed many genuine issues did exist. Respondents had attempted to plead the 3, 5 and 10 year statutes of limitations, and even the 25 year statute of limitation, all of which pleadings injected the many genuine issues into this lawsuit which are common when a litigant invokes limitations and adverse possession as a link in his chain of title, whether same be plead affirmatively by a plaintiff or as an affirmative defense by a defendant. Respondents injected still additional genuine issues in the motion of respondent J. O. Brown for summary judgment (Tr. 52-57). Said respondent even quoted some of Petitioner's testimony, taken in a former deposition, and asked the Court to pass upon same as a basis for granting the motion for summary judgment. The fact that Petitioner was a party to this lawsuit, interested in the outcome and results of same, within itself created genuine issues because it is the province of the Court, on a trial of the case, on its merits, or a jury, to pass upon the credibility of the witness and the weight, if any, to be given his testimony. *Sartor, et al, vs. Arkansas Natural Gas Corporation*, 321 US 620; 64 S. Ct. 724. That Petitioner duly filed his verified controverting answer and affidavit to the motion of respondent J. O. Brown for summary judgment (Tr. 58-69). That in said controverting answer and affidavit he denied under oath all allegations as made by J. O. Brown, save and except what he expressly

admitted. He incorporated, by reference, his second amended original petition, on file in this cause, into said controverting answer and affidavit, thereby creating under oath the many genuine issues as reflected in both this second amended original petition and his controverting answer and affidavit to the motion for summary judgment. Petitioner further set out that he had personal knowledge of the allegations of such genuine issues and was therefore competent to testify and would testify upon the trial of the case, on its merits. That, in addition thereto, he had numerous witnesses who had personal knowledge of some, if not all, of the allegations showing the existence of genuine issues and were therefore competent to testify and would testify upon the trial of the case, on its merits. (Tr. Paragraph IX p. 67).

10. The Court of Appeals in holding in its judgment and decision that the District Court properly treated the respondents' motion to dismiss as a motion for summary judgment and properly granted summary and affirmative relief to resepondents and further holding that Petitioner's claim for relief was res judicata, and in approving and sanctioning the judgment of the Trial Court, by affirming it, has deprived Petitioner of his property, property rights and vested rights without due process of law, in such a manner as is prohibited by the due process clause of the 5th Amendment to the Constitution of the United States, in that Petitioner has been denied his day in Court, his opportunity to offer

his evidence and has been denied a trial of his claim for relief, on its merits, before a competent Judge and/or jury as guaranteed to him by said 5th Amendment. This question is of vital importance to every litigant who is or may become a party to a lawsuit in any United States District Court of this nation.

Rule 56, Federal Rules of Civil Procedure, which is the Federal summary judgment rule, authorizes summary judgment only where the moving party is entitled to judgment, as a matter of law, where it is quite clear what the truth is, that no genuine issue as to a material fact between the parties to the lawsuit remains for trial, and that if any testimony is admitted then it is for the jury, or the Court sitting as a competent court at the trial of the cause, on its merits, to pass upon the credibility of the witness and the weight, if any, to be given their testimony. There was no motion filed for summary judgment in the case at bar by any respondent, except J. O. Brown. It is ridiculous to conceive of a dead man being entitled, as a matter of law, to recover in a lawsuit, from any living person. There were no pleadings on the part of any other respondent seeking affirmative relief. The only motion presented to and urged by respondents, at the hearing and therefore the only motion which was heard by the Court or could have been heard by him was the motion to dismiss Petitioner's bill of complaint, as filed by respondents on the 17th of January, 1958. Respondents abandoned or

waived all other motions. The summary judgment as rendered by the District Court is wholly erroneous and certainly without support, either in law or facts, as to its recitation, and purported action in granting and sustaining all other motions or any other motions save and except the one filed by respondents, on said 17th day of January, 1958.

11. The case at bar, in which the Court of Appeals has held that Petitioner's claim for relief is res judicata by reason of the state proceedings which terminated in this court in the case of Chandler vs. Brown, et al, supra, by denial of Petitioner's application for writ of certiorari, is in direct conflict with the holding in the case of *McCrea vs. Jackson*, 148 Fed. 2d 193, which latter case was decided by the Circuit Court of Appeals, 6th Circuit, and in passing upon the effect of denial of writ of certiorari by this Court, on page 197, made the following statement:

> "We cannot accept as valid the argument of appellee that the denial by the Supreme Court of the United States of the petition for certiorari constitutes res judicata against the petitioner of all questions presented by that petition. The Supreme Court has said that 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times'." Citing numerous authorities.

12. The Court of Appeals in holding in its judgment and decision, and in ruling that petitioner's

points on Appeal 10-13 (Tr. 209-210), in which he complained of being wrongfully denied leave to file amended and/or supplemental pleadings, was devoid of merit and overruling same; such amended pleadings were necessary to set out fully his additional count in his Bill of Complaint that he had been denied his civil rights, equal protection of the laws of the State of Texas, and had been deprived of his property, property rights, and vested rights, without due process of law—all in violation of the guarantees and prohibitions of Section 1 of the 14th Amendment to the Constitution of the United States, by the proceedings in and through the state courts, beginning with the summary proceedings in the District Court of Midland County, Texas, and ending in the Supreme Court of Texas by the court overruling petitioner's Motion for Rehearing on his Application for Writ of Error, and then, thereafter, denying petitioner leave to file a second and combined motion for such leave and for rehearing, which had been timely presented to said court for filing. The Court of Appeals further holding in its judgment and decision that the Trial Court was correct in denying petitioner leave to file such amended and/or supplemental pleading by approving and sanctioning, the judgment of the trial court, by affirming same. All of said acts being contrary to, in violation of, and in opposition to the applicable decisions of this court.

Due to the nature of the proceedings, in the case at bar, and especially due to the many things which

had transpired subsequent to petitioner filing his Second Amended Original Petition (Bill of Complaint) in the United States District Court, it was absolutely necessary in order that justice might be done at the hearing for additional amended and/or supplementary pleadings be filed by petitioner in order to properly reflect these subsequent transactions and their legal effect upon his claim for relief. Petitioner had sought on numerous occasions to get leave to file such amended and/or supplemental pleadings, showing how he had been denied his federal rights and further showing that his claim for relief was not res judicata.

That proper supplemental complaints and amended pleadings would have been filed by Petitioner had not he been denied leave to file same by the Trial Court, as shown in Paragraph I of his answer. (Tr. 107-108). He further urged his right to file proper amended and supplemental pleadings before he made an announcement on the hearing. (Tr. pp. 137, 139; 142, 143, 145, 146, 147, 149). Petitioner believes the Trial Court erred and that it was an abuse of the Trial Court's discretion to deny him the right to file amended and supplemental pleadings, due to the following facts: (1) That the Court, by his orders and statements made in open Court, in the presence of counsel for respondents had led Petitioner to believe that such leave would be granted him in proper time, as the Court might deem necessary. The Court denying leave to Petitioner at each and every time he requested such leave. The Court admitted this upon the call of

respondents' motion to dismiss, (Tr. p. 138). (2) Under the Federal Rules of Civil Procedure and especially under Rule 15, such leave should have been granted to file a supplemental bill of complaint and also amend his second amended (original petition) bill of complaint, and under Rule 8 should have been permitted to file an amended answer to respondents' motion to dismiss, since such pleadings would not and could not prejudice the rights of any respondent and in order that justice might be done on the hearing. That such leave to amend would have been in line with the applicable decisions of this Court.

In the case of *United States of America, v. E. B. Hougham et al,* U.S. ; 81 S. Ct. 13; L. Ed. this Court in passing upon a smilar question made the following statement,

> "This fact leads naturally to the conclu on that the ordinary liberal rules governing the amendment of pleadings are applicable. The applicable rule is Rule 15 of the Federal Rules of Civil Procedure, which was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. Despite respondents' argument to the contrary, we see this case as one where there plainly was no such prejudice. In such a situation, acceptance of respondents' contention on this point would subvert the basic purpose of the Rule. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading

is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80. We therefore conclude that under the circumstances of this case the Government had a right to amend its pleadings and that the District Court erred in refusing to permit such amendment."

Earlier cases which held in effect the same principles are the cases of *Susie Maty, Administratrix, vs. Gosselli Chemical Company*, 303 U.S. 197; 58 S. Ct. 507; 82 L. Ed. 745; *Hardin vs. Boyd*, 113 U. S. 736-768; 28 L. Ed. 1141; 5 S. Ct. 771.

Without a doubt, this is a prime example where the proceedings in the trial court and upon the hearing were permeated with an indifferent and unfriendly attitude towards petitioner, and his claim for relief, by reason of the fact this controversy had been in the court so long and the trial court, apparently, was not, at all, anxious to review the records in and through the state proceedings in the case of *Chandler vs. Brown, supra*, which terminated in this court by denial of petitioner's application for certiorari; with a philosophy hostile to that intended by, reflected in and commanded by Section 1 of the 14th Amendment to the Constitution of the United States.

The action of the trial court in trying to dispose of this controversy, by dismissing same and granting summary judgment to respondents, is the very type of procedure condemned by this court in the

case of *Sartor, et al vs. Arkansas Natural Gas Corporation*, 321 U.S. 620; 64 Su. Ct. 724.

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Insurance Co. v. Gentile Brothers Co., 109 F. 2d 732; Whitaker v. Coleman, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

This general antagonistic spirit or attitude on the part of the trial court is specifically illustrated in his attempt to deny petitioners the right to further prosecute his claim for relief (Tr. 195-196) heretofore quoted under Reason # 1 for granting certiorari. In giving vent to this attitude the Court of Appeals tried to reach out and say the trial court acted under authority of Federal Rules of Civil Procedure, Rule 12(b)(6) when it is evident from the face of the trial court's judgment that he did not propose or pretend to act under such procedure; but granted summary relief upon motions for summary judgment (which he recited in his judgment) had heretofore been filed by respondents. This statement in the judgment was not and is not correct.

The record in this case clearly shows that no respondent ever filed motions for summary judgment, except, J. O. Brown, and this motion was abandoned and/or waived upon the hearing; because at the hearing only the motion to dismiss petitioner's bill of complaint, as filed by respondents, on the 17th day of January, 1958 was presented, by respondents, to the court for action. The Court of Appeals further gave vent to this indifferent and unfriendly attitude toward petitioner's claim for relief, with a philosophy still hostile to the intent and purpose and commandments of said Section 1 of the 14th Amendment to the Constitution, in holding that Petitioner's claim for relief was res judicata by reason of the State proceedings, in the case of *Chandler vs. Brown, et al, supra*, and in which this court denied certiorari, when such holding is directly in conflict with all applicable decisions of the court and many former decisions of the court below.

The court below even went so far as to call attention in its footnotes that the judgment as rendered in the District Court of Midland County, Texas, was approved by petitioner and his attorney, stating further, however, that it assumed that such act, was as to form only. As a matter of fact, petitioner did not put his signature on such judgment, for any purpose, whatsoever, nor did he authorize anyone else to do so. He does not know how his name happens to appear on such judgment, but calls on Mr. W. H. Pannil, Counsel for Respondents, to explain to this court how it happens that petitioner's name appeared on the judgment. Mr. Pannil doubtless

knows, since, so far as petitioner knows, he prepared the judgment and secured the signature of the judge of the District Court of Midland County, Texas, thereon.

Throughout this proceeding, in both the trial court and the Court of Appeals, it appears that each court has completely lost sight of the fact that Sec. 1 of the 14th Amendment to the Constitution of the United States is seriously and materially involved and as was said by this court in the case of *Chessman vs. Teets*, 77 S. Ct. 1127, 254 U.S. 156:

> "The proponent before the Court is not the petitioner but the Constitution of the United States."

CERTIORARI SHOULD BE GRANTED DUE TO GENERAL IMPORTANCE OF QUESTION.

Writ of certiorari should be granted in this cause due to the importance of the questions presented, involving as it does proper procedure on a motion to dismiss, under the authority of Rule 12(b)(6) of the Federal Rules of Civil Procedure, Title 28, U. S.C.; Title 28, U.S.C.A. where matters outside the record are presented to the court, but where the greater portion thereof are excluded by the court; if under such circumstances the trial court has the authority to treat the motion to dismiss as a motion for summary judgment and to proceed with the hearing as if said hearing was being conducted un-

der Federal Rule 56, being the Federal summary judgment rule. These questions of procedure are of extreme importance to all litigants which now have or may hereafter have matters involving motions to dismiss in any and all district courts of the United States.

Mascro Plastic Corporation v. National Labor Relations Board, 350 U.S. 270; 76 Su. Ct. 349.

Czaplicki v. The S. S. Hough Silver Cloud, 351 U.S. 525, 76 Su. Ct. 946.

Southern Pacific Company v. Gileo, 351 U.S. 493; 76 Su. Ct. 952.

Martha C. Reed v. Pennsylvania Railroad Company, 351 U.S. 502; 76 Su. Ct. 958.

U. S. v. Quarles, 350 U.S. 11; Su. Ct. 1.

McGee v. International Life Insurance Company, . U.S. , 78 Su. Ct. 199.

CONCLUSION

WHEREFORE, Petitioner Prays, that for the foregoing reasons this petition for Writ of Certiorari be granted, and that petitioner recover of respondents all costs of this proceeding.

J. M. CHANDLER
Petitioner

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and

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Petitioner

and

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Fredericksburg, Texas
Counsel for Petitioner

By .....
Alfred Petsch

APPENDIX "A"

FINAL JUDGMENT.

Filed January 14, 1959.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

PECOS DIVISION

J. M. CHANDLER,
Plaintiff,

versus

J. (JEROME) O. BROWN, et al,
Defendants.

CIVIL ACTION NO. 2235

On this 15th day of December, 1958, came on to be heard the above styled and numbered cause, and came the Plaintiff in his own proper person, and came the Defendants J. (Jerome) O. Brown, Daryl Davis, D. A. Ross, El Capitan Oil Company, "B. A. Ross," and Lone Star Producing Company by and through their attorneys of record, Scarborough, Black & Tarpley of Abilene, Texas, and Stubbleman, McRae, Sealy & Laughlin, of Midland, Texas, and it appearing to the Court that this is the time and place heretofore set by the Court for hearing and consideration of the Motions to Dismiss and Motion for Summary Judgment filed herein by and on behalf of Defendants and the Court having heard and

considered all of the Motions filed herein by all parties hereto and having heard the evidence and offers of evidence, and having considered such Motions, together with the documents, exhibits and affidavits and depositions on file herein attached thereto and referred to therein, and it appearing to the Court and the Court finds:

(a) That this is the time and place set for hearing such Motions and that all parties have duly received notice thereof and are properly before the Court;

(b) That this cause of action was originally filed by Plaintiff in the District Court of Midland County, Texas, on December 14, 1951, whereupon said Honorable Court acquired exclusive jurisdiction of the rights, interests, claims and causes of action asserted by Plaintiff and against Defendants, and so had such exclusive jurisdiction as of and prior to the filing by Plaintiff of the Original and Amended Complaints herein;

(c) That there is no genuine issue of any material fact between Plaintiff and Defendants herein because Plaintiff's purported suit and cause of action is barred by the four-year statute of limitations of the State of Texas as well as by the law of laches, estoppel and stale demand;

(d) That a final judgment was rendered by the Honorable District Court of Midland County, Texas, 70th Judicial District of Texas, on the same facts, claims and causes of action herein set out and al-

leged by Plaintiff, and at a time when this suit was pending in this Honorable Court, and that an appeal from such judgment has been duly prosecuted by Plaintiff herein to and through the Court of Civil Appeals for the Eighth Supreme Judicial District sitting at El Paso, Texas, the Supreme Court of the State of Texas, and that a Petition for a Writ of Certiorari to such Courts has been denied by the Supreme Court of the United States, and that such judgment and judgments and appeals and orders by appellate Courts herein were and are res adjudicata of any and all issues, causes of action, claims or demands which Plaintiff has or might assert against Defendants herein and arising out of the facts and transactions alleged by him in his Complaint;

(e) That Plaintiff herein was duly notified as required by the requisite statutes and rules of procedure of each and all of the above hearings, appeals and arguments, and duly appeared in the trial Court and presented his argument and opposition to the entry of such judgment and duly prosecuted his appeal from such judgment, filing briefs and arguments in the various appellate Courts, and that all provisions of the Constitution of the United States requiring due process of law have been duly and fully complied with by the Statutes and Rules of Procedure of the State of Texas and the proceedings in the District Court of Midland County, Texas, and the appellate Courts of Texas in this case that Plaintiff had due and legal notice of such proceedings and was afforded an opportunity to be heard and was heard;

(f) That all necessary parties are properly before this Court, and that there is no necessity for bringing in any new or additional parties herein.

It is, Therefore, Ordered, Adjudged and Decreed:

1. That the Motions of Plaintiff for leave to file amended complaints and pleadings herein and set up new causes of action asserting any purported violation of his civil rights be, and the same are hereby, in all things overruled, refused and denied.

2. That the Motions of Plaintiff for leave to file amended complaints and pleadings herein joining and bringing in and naming new and additional parties Defendant be, and the same are, in all things refused, overruled and denied.

3. That the Motion for Summary Judgment heretofore filed herein by Defendants be, and the same is in all things hereby, granted and sustained and that Summary Judgment be, and the same is, hereby granted in favor of defendants and against Plaintiff herein.

4. That each and all of the Motions to Dismiss heretofore filed by or on behalf of any or all of the Defendants herein be, and the same are hereby, granted and sustained, and that Plaintiff's suit and cause of action alleged and asserted herein against Defendants be, and the same is, finally dismissed with prejudice to Plaintiff's rights to re-file or further prosecute the same.

5. That Plaintiff have and recover nothing of and from the Defendants as to any claim or cause of action, right, title or interest or claim for establishment or proof of any lost deed or conveyance as to any of the lands involved herein, to-wit:

> All of Sections 1 and 2 and the East 350 acres of Section 12 in Block 41, Township 2 South, Texas & Pacific Railway Company Survey, in Midland County, Texas,

and that said lands and the interests therein as shown of record be vested in Defendants free and clear of any claim, demand, suit or cause of action asserted by Plaintiff.

6. That any and all claims for relief by any party herein and not herein expressly granted be, and the same are hereby, in all things denied, and that Plaintiff pay all costs on this behalf expended, for which let execution or other legal process issue as provided by law.

Entered this 14th day of January, 1959.

(Signed) R. E. THOMASON,
Judge.

Entered in Minutes
Volume J: Page 28.

United States of America
Western District of Texas *ss*:

I, Maxey Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original FINAL JUDGMENT entered in Civil Action No. 2235, styled J. M. Chandler v. J. O. Brown, et al., now remaining among the records of the said Court in my office.

IN TESTMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Pecos, Texas, this 18th day of February, A. D. 1961.

Maxey Hart, Clerk.
By James Drane, Deputy Clerk.

(Seal)

APPENDIX "B"

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17861

J. M. CHANDLER,
Appellant,
versus
J. (JEROME) O. BROWN, ET AL,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(September 2, 1960.)

Before CAMERON, JONES and BROWN, Circuit Judges.

CAMERON, Circuit Judge: The main question before us here is whether the district court erred in deciding that a judgment rendered by a State court of Texas was res judicata of the claim here sued on. The appellant files with his brief forty assignments of error, which he reduces to twelve questions. We think the case presented is a simple one and that the court below decided it correctly.

The original complaint, based upon diversity jurisdiction, was filed by appellant Chandler, as plaintiff, on April 22, 1955 against appellees J. O. Brown, Daryl Davis, D. A. Ross, B. A. Ross, El Capitan Oil Company and Lone Star Producing Company as defendants. The complaint set forth that, being the owner of a one-third interest in a large tract of land in Midland County, Texas, he conveyed all of his interest to C. M. Pynes by deed filed January 27, 1930, such conveyance being in trust for the said Chandler, the said Pynes agreeing to reconvey same to Chandler or anyone he might designate at any time he was requested to do so. It was further alleged that, in pursuance of said trust agreement, said Pynes conveyed the minerals under the property to appellee J. O. Brown "in trust for and to be held for plaintiff J. M. Chandler;" and that said Brown discharged said trust by reconveying to said Chandler the entire one-third undivided mineral interest; that the appellant had lost said conveyance, which was made to him in the first half of 1930, and had been unable to find same. It was further alleged that lis pendens notice was filed in the District Court of Midland County, Texas, December 14, 1951 in connection with the filing of a suit by Chandler in said court. In November, 1955, appellant filed his first amended complaint and on February 1, 1956, he filed his second amended complaint bringing in several additional parties who claimed under those initially sued.

In the meantime, before the filing of said amended pleadings the appellees Brown, Davis, Ross, El Cap-

itan and Lone Star filed their answers denying the allegations of appellant's complaint, and set up that said Brown had occupied the land peaceably and without interruption since its acquisition, and that appellant was barred from recovery by the statutes of limitations of the State of Texas and by laches. Appellee Brown filed a motion to dismiss and a motion for summary judgment charging that, on February 3, 1956, the District Court of Midland County, Texas had entered a judgment against appellant and in favor of said appellees adjudicating the issues sought to be presented by appellant Chandler's pleadings in the court below. A copy of that judgment was attached to one of these motions,[1] along with a copy of Chandler's complaint in said State court action, and other relevant documents.[2]

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[1] The said judgment shows that it was approved by J. M. Chandler and his attorneys, but we assume that the approval was only as to form.

[2] Copy of said judgment follows:

"On this 3rd day of February, 1956, came on to be heard in the above styled and numbered cause the motions for summary judgment filed herein by defendants, and came plaintiff in person and by attorney and presented his application for continuance and postponement of the hearing on motions for summary judgment, and the Court having considered such motion and the affidavit attached thereto and having heard the evidence offered by defendants in opposition thereto, including the motions for summary judgment and affidavits and exhibits in support thereof, and the affidavits and exhibits filed by plaintff in opposition to and controvering [sic] said motions for summary judgment, and it appearing to the Court that no good ground for continuance or postponement has been presented and that such application for continuance or postponement should be overruled, the same was, and is hereby overruled, to which ruling, order and action of the Court plaintiff, J. M. Chandler, excepted;

"And, thereupon, came the defendants, J. (Jerome) O. Brown, Daryl Davis and D. A. Ross, and presented to the

We think that the court below correctly treated this action as being before it upon motions for sum-

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Court their motions for summary judgment, together with the affidavits attached thereto and the exhibits attached thereto and referred to therein, and it appearing to the Court that such motions have been duly filed and served upon the plaintiff, J. M. Chandler, in the manner and for the length of time required by law, and that the plaintiff, J. M. Chandler, has had due notice of this hearing and that this is the regular and correct time and place for hearing said motions, and the Court having considered the motions for summary judgment, the affidavits attached thereto and the exhibits attached thereto and referred to therein, including the depositions on file among the papers of this cause, and having considered the affidavits in opposition to the controvering [sic] such motions for summary judgment, and it appearing to the Court that this is a proper case for the granting of summary relief, and that there are no material issues of fact to be determined upon a trial of this cause, and the Court having considered the motions, the evidence and heard arguments of counsel, and it appearing to the Court that the law is with the defendants, and that motions for summary judgment should be granted and sustained;

"It Is, Therefore, Ordered, Adjudged and Decreed that the motions for summary judgment filed herein by J. (Jerome) O. Brown, Daryl Davis and D. A. Ross be, and they are in all things granted and sustained.

"It Is Further Ordered, Adjudged and Decreed that plaintiff, J. M. Chandler, take nothing as against the defendants J. (Jerome) O. Brown, Daryl Davis, D. A. Ross and any purchasers pendente lite from such persons who may be bound by this decree on plaintiff's action in trespass to try title.

"It Is Further Ordered, Adjudged and Decreed that plaintiff, J. M. Chandler, take nothing against said defendants J. (Jerome) O. Brown, Daryl Davis, D. A. Ross and any purchasers pendente lite from such persons who may be bound by this decree on his action to establish a trust and establish the contents of a lost deed, and that such cause of action and all relief sought therein be, and the same is hereby, denied.

"It Is Further Ordered, Adjudged and Decreed that any relief requested by any party and not herein expressly granted be, and the same is hereby, denied, and that plaintiff pay all costs in this behalf expended, for which let execution issue.

"To which action of the Court plaintiff, J. M. Chandler in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District at El Paso, Texas.

(S) PERRY D. PICKETT,
Judge."

mary judgment as to all of the appellees, all of them including in their motions matters outside the pleadings.[3] All of the parties proceeded in the presentation of the case to the court below upon the assumption that the matter was being heard upon motions for summary judgment.

It was undisputed that appellant Chandler appealed from the judgment of the Midland County District Court to the Texas Court of Civil Appeals, which affirmed the action of the trial court,[4] and that a writ of error to the Supreme Court of Texas was dismissed or refused by it,[5] and that the Supreme Court of the United States denied certiorari, 356 U.S. 930.

The statement of facts by the Court of Civil Appeals of Texas shows beyond doubt that all questions of law and fact presented to the court below had

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[3] 12(b) F.R.C.P.:

". . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . ."

And see the following cases from this Circuit: Herron, Sr. v. Herron, Jr., 1958, 255 F.2d 589; Dinwiddie v. Brown and Roark v. West, 1956, 230 F.2d 465, certiorari denied, 351 U.S. 971, rehearing denied, 352 U.S. 861; Slagle v. United States, 1956, 228 F.2d 673; Chappell v. Goltsman, 1950, 186 F.2d 215.

[4] Chandler v. Brown, 1957, Ct. Civ. App. Tex., 301 S.W.2d 702.

[5] Shepard's Texas Citations, Vol. LIII, No. 3, p. 238.

been decided against appellant by the Texas Courts in that proceeding.[6]

There being no issue as to what transpired in the Texas trial court, and the appellate courts of Texas

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[6] 301 S.W.2d pp. 721-722:

"The record title to the property in question is as follows: The common source of title to such property is shown to be in the appellant, J. M. Chandler. He conveyed the property to C. M. Pynes by deed recorded in 1929. C. M. Pynes conveyed to J. O. Brown by deed recorded in 1930. J. O. Brown executed an oil and gas lease on the undivided one-third mineral interest in question to appellee Daryl Davis, dated April 27, 1951. Daryl Davis assigned said lease to D. A. Ross May 2, 1951. On December 14, 1951 there was filed in the county clerk's office a lis pendens notice showing a suit had been filed in the district court of Midland County, Texas, by J. M. Chandler, as plaintiff, against appellees herein for trespass to try title on the lands in question. D. A. Ross assigned the above described lease in its entirety to El Capitan Oil Company by two assignments, one dated June 20, 1952, and the other dated July 13, 1953. There was excepted and reserved to the grantor, however, a 1 48 interest in the oil and gas and other minerals as an overriding royalty interest. On December 21, 1953, there was filed a division of interest agreement, executed by Daryl Davis and D. A. Ross, under which a 1 48 overriding royalty interest was divided equally between them. Appellee J. O. Brown, by mineral deeds dated February 4, 1954 and May 10, 1954, conveyed an undivided one-sixth mineral interest to Daryl Davis, subject however, to the above oil and gas lease. There were numerous conveyances subsequently. However, we do not believe it necessary to set them out here.

"On April 26, 1955, appellant filed his First Amended Original Petition in which, in addition to alleging formal trespass to try title, he specially plead his title. He alleged the record title to be in appellees, but that J. O. Brown had received his deed to the mineral interest in question from D. M. Pynes in March, 1930, in trust for the appellant, J. M. Chandler, and thereafter, in the same year, 1930, J. O. Brown satisfied said trust by executing and delivering to appellant a deed to said minerals, but that said deed had been lost or destroyed. On this amended original petition, appellant caused citation to be issued. There had been no citation issued on the original petition filed December 14, 1951. Appellees answered in due time on pleas of not guilty, general denial, limitations, laches, and stale demand. Appellees Davis and Ross also plead that they were innocent purchasers for value,

having affirmed what was done by the trial court and having rendered judgment prior to the one here appealed from, the state court proceedings are res judicata of all of the questions raised by appellant here A good statement of the rule is set forth in *Commissioner of Internal Revenue v. Sunnen*, 1948, 333 U. S. 591, 597:

> "The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter

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insofar as the oil and gas lease was concerned. Appellees filed their motions for summary judgment, which were set for hearing February 3, 1956. On February 3rd, appellant J. M. Chandler filed his motion for continuance, setting out, in effect, that he had one witness by the name of a Mrs. Smith, who lived somewhere in Shreveport, Louisiana, who saw the alleged deed from J. O. Brown to J. M. Chandler in 1935 or 1936, and that he needed time to get an affidavit from her. He further said that he had not had time to work out the values of oil and gas leases in the area of the land in question as of April 1951, and that he would like more time for such investigation so he could present proof on the question of what the values of oil and gas leases were in that area at the time appellee Daryl Davis bought the lease from J. O. Brown. Appellant's motion for continuance was overruled and, on the hearing, judgment was entered for appellees and any purchasers pendente lite, that appellant take nothing."

which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment . . ."[7]

Appellant insists that he has never had a hearing on the merits of his case. The record shows that each court he has entered has dealt with him generously. The Court of Civil Appeals of Texas[8] held that, under the undisputed facts, based upon the affidavits and depositions before it (particularly the deposition of appellant), the State Court suit was barred by the Texas Statute of Limitations and also by laches. We are bound by the holding of the courts of Texas as to Texas real property law and as to limitations. A careful examination of the record in the case as made in the Texas courts shows that the judgment therein rendered and affirmed was amply supported.

This Court has been called upon to deal with con-

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[7] To the same effect see: Southern Pacific Railroad Co. v. United States, 1897, 168 U.S. 1, 18 S.Ct. 18, 42 L. Ed. 355; Grubb v. Public Utility Comm., 1930, 281 U.S. 470, 50 S. Ct. 374, 74 L. Ed. 972; Tait v. Western Maryland Railway Co., 1933, 289 U.S. 620, 53 S. Ct. 706, 77 L. Ed. 1405; Fishgold v. Sullivan Dry Dock and Repair Corp., 1946, 328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230; United States v. Munsingwear, Inc., 1950, 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36.

[8] 301 S.W.2d 722 et seq.

tentions that State court judgments should not bar actions in the federal court and, in a case much more favorable on its facts to the losers than this case is to the appellant here, we held the federal action barred by the State court proceeding, *Hudson et al v. Lewis et al*, 1951, 188 F.2d 679; and cf. *Hudson v. Gulf Refining Co.*, S. Ct. Miss., 1947, 30 So.2d 66; and *Niehaus et al v. Magnolia Textiles, Inc.*, 5 Cir., 1949, 175 F.2d 977.

Finding the large number of questions argued by appellant devoid of merit and being of the opinion that the court below was correct in applying to the facts in this record the principles of law upon which its judgment was based, said judgment is

AFFIRMED.

A true copy
Test:
EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

DEC 22, 1960

APPENDIX "C"

JUDGMENT.

Extract from the Minutes of September 2, 1960

J. M. CHANDLER,

No. 17861. versus

J. (JEROME) O. BROWN, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, J. M. Chandler, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 17861

J. M. CHANDLER,
Appellant,

versus

J. (JEROME) O. BROWN, ET AL,
Appellees

Appeal from the United States District Court for the Western District of Texas.

(October 3, 1960)

ON PETITION FOR REHEARING

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellant's petition for rehearing be, and it is hereby DENIED.

APPENDIX "E"

Fifth Amendment to the Constitution of the United States, United States Code Annotated, page 102, Constitutional Amendments:

"AMENDMENT V—

CAPITAL CRIMES; DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Irrelevant portion omitted.)

Seventh Amendment to the Constitution of the United States, United States Code Annotated, page 379, Constitutional Amendments:

"AMENDMENT VII—CIVIL TRIALS

In Suites at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

APPENDIX "E" Continued

Section 1, Fourteenth Amendment to the Constitution of the United States, United States Code Annotated, page 2, Constitutional Amendments:

"AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 15 and 19 of Article 1 of the Constitution of the State of Texas, Vernon's Constitution of the State of Texas Annotated, Volume 1, page 356:

"Right of trial by jury

Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury. As amended Aug. 24, 1935."

APPENDIX "E" Continued

page 446:

"Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Article 2123 of the Texas Civil Statutes, Vernon's Civil Statutes of Texas Annotated, Volume 6, page 50:

"Art. 2123. Right to jury

The right to trial by jury shall remain inviolate, subject to the following rules and regulations. (Const. art. 1, sec. 15.)"

Article 2124, Texas Civil Statutes, Vernon's Civil Statutes of Texas Annotated, Vol. 6, p. 53:

"Art. 2124. Demand and fee

No jury trial shall be had in any civil suit, unless an application therefor be made in open court, and a jury fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county. (Acts 1876, p. 171; G.L. vol. 8, p. 1007.)"

APPENDIX "E" Continued

Article 7364 of the Texas Civil Statutes, Vernon's Civil Statutes of Texas Annotated, Volume 20, page 665:

'Article 7364. Method of trying titles

All fictitious proceedings in the action of ejection are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title. Act. Feb. 5, 1840; G.L. vol. 2, p. 310."

Article 5529 of the Texas Civil Statutes, Vernon's Civil Statutes of Texas Annotated, Volume 16, page 545:

"Art. 5529. All other actions barred, when

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

Article 7391, Texas Civil Statutes, Vernon's Civil Statutes of Texas Annotated, Volume 20, p. 791:

"Art. 7391: Final judgment conclusive

Any final judgment rendered in any action for the recovery of real estate shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons

APPENDIX "E" Continued

claiming from, through or under such party, by title arising after the commencement of such action."

Rule 1, Texas Rules of Civil Procedure, Vernon's Annotated Texas Rules of Civil Procedure:

"Rule 1. Objective of Rules

The proper objectives of rules of civil procedure is (are) to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction."

Rule 815, Texas Rules of Civil Procedure, Vernon's Annotated Texas Rules of Civil Procedure:

"Rule 815. Substantive Rights Unaffected

These rules shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action."

Rule 166-A of the Texas Rules of Civil Procedure, Vernon's Annotated Texas Rules of Civil Procedure:

"Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to re-

cover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavit, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits, Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX "E" Continued

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. As amended by order of October 10, 1951, effective March 1, 1952."

Texas Rules of Civil Procedure Nos. 783-805, inclusive, Vernon's Annotated Texas Rules of Civil Procedure, pages 78-131:

"Rule 783. Requisites of Petition

The petition shall state:

(a) The real names of the plaintiff and defendant and their residences, if known.

(b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other

APPENDIX "E" Continued

estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.

(d) That the plaintiff was in possession of the premises or entitled to such possession.

(e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(g) It shall conclude with a prayer for the relief sought."

"Rule 784. The Possessor Shall Be Defendant

The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied."

"Rule 785. May Join As Defendants, When

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff."

"Rule 786. Warrantor, etc., May Be Made a Party

When a party is sued for lands, the real owner or warrantor may make himself, or may be made, a party defendant in the suit, and shall be

entitled to make such defense as if he had been the original defendant in action."

"Rule 787. Landlord May Become Defendant

When such action shall be commenced against a tenant in possession, the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant; and he shall be entitled to make the same defense as if the suit had been originally commenced against him."

"Rule 788. May File Plea of "Not Guilty" Only.

The defendant in such action may file the plea of 'not guilty,' which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same."

"Rule 789. Proof Under Such Plea

Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded."

"Rule 790. Answer Taken As Admitting Possession

Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title

APPENDIX "E" Continued

thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only."

Rule 12(b), Federal Rules of Civil Procedure, Title 28, U.S.C.; Title 28, U.S.C.A.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense num-

APPENDIIX "E" Continued

bered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Rule 15, Federal Rules of Civil Procedure, Title 28, U.S.C.; Title 28, U.S.C.A.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the

parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentations of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems

APPENDIIX "E" Continued

it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

APPENDIX "F"

J. M. CHANDLER, Appellant,

v.

J. (Jerome) O. BROWN Et Al., Appellees.

No. 5195

Court of Civil Appeals of Texas.

El Paso

Decided March 13, 1957

Reported 301 S. W. 2nd 720

Rehearing Denied May 8, 1957.

This is a suit wherein J. M. Chandler, appellant, sued J. (Jerome) O. Brown, Daryl Davis, and D A. Ross, in trespass to try title for one-third interest in and to the minerals in and under 1630 acres of land lying in Midland County. On motions for summary judgment filed by J. (Jerome) O. Brown and Daryl Davis and D. A. Ross, appellees, the court entered judgment that appellant J. M. Chandler take nothing as against appellees, from which judgment J. M. Chandler appeals.

APPENDIX "F" Continued

The record title to the property in question is as follows: The common source of title to such property is shown to be in the appellant, J. M. Chandler. He conveyed the property to C. M. Pynes by deed recorded in 1929. C. M. Pynes conveyed to J. O. Brown by deed recorded in 1930. J. O. Brown executed an oil and gas lease on the undivided one-third mineral interest in question to appellee Daryl Davis, dated April 27, 1951. Daryl Davis assigned said lease to D. A. Ross May 2, 1951. On December 14, 1951 there was filed in the county clerk's office a lis pendens notice showing a suit had been filed in the district court of Midland County, Texas, by J. M. Chandler, as plaintiff, against appellees herein, for trespass to try title on the lands in question. D. A. Ross assigned the above described lease in its entirety to El Capitan Oil Company by two assignments, one dated June 20, 1952, and the other dated July 13, 1953. There was excepted and reserved to the grantor, however a 1/48th interest in the oil and gas and other minerals as an overriding royalty interest. On December 21, 1953, there was filed a division of interest agreement, executed by Daryl Davis and D. A. Ross, under which a 1/48th overriding royalty interest was divided equally between them. Appellee J. O. Brown, by mineral deeds dated February 4, 1954 and May 10, 1954, conveyed an undivided one-sixth mineral interest to Daryl Davis, subject however, to the above oil and gas lease. There were numerous conveyances subsequently.

APPENDIX "F" Continued

However, we do not believe it necessary to set them out here.

On April 26, 1955, appellant filed his First Amended Originial Petition in which, in addition to alleging formal trespass to try title, he specially plead his title. He alleged the record title to be in appellees, but that J. O. Brown had received his deed to the mineral interest in question from C. M. Pynes in March, 1930, in trust for the appellant, J. M. Chandler, and thereafter, in the same year, 1930, J. O. Brown satisfied said trust by executing and delivering to appellant a deed to said minerals, but that said deed had been lost or destroyed. On this amended original petition, appellant caused citation to be issued. There had been no citation issued on the original petition filed December 14, 1951. Appellees answered in due time on pleas of not guilty, general denial, limitations, laches, and stale demand. Appellees Davis and Ross also plead that they were innocent purchasers for value, insofar as the oil and gas lease was concerned. Appellees filed their motions for summary judgment, which were set for hearing February 3, 1956. On February 3rd, appellant J. M. Chandler filed his motion for continuance, setting out, in effect, that he had one witness by the name of a Mrs. Smith, who lived somewhere in Shreveport, Louisiana, who saw the alleged deed from J. O. Brown to J. M Chandler in 1935 or 1936, and that he needed time to get an affidavit from her. He further said that he had not had time to work out

the values of oil and gas leases in the area of the land in question as of April 1951, and that he would like more time for such investigation so he could present proof on the question of what the values of oil and gas leases were in that area at the time appellee Daryl Davis bought the lease from J. O. Brown. Appellant's motion for continuance was overruled, and, on the hearing, judgment was entered for appellees and any purchasers pendente lite, that appellant take nothing.

Appellant's first point of error is that the court erred in overruling appellant's motion for continuance. Matters of continuances rest largely within the discretion of the trial court and, unless we find that it abused its discretion, we cannot set its ruling aside. We do not find any abuse of discretion in this case. It appears that this case had been filed at the time the motion was set for hearing for more than four years, and that the trial court had, in December, sent a notice to appellant that the case was set for trial January 23rd, or that the same would be dismissed for lack of prosecution. On December 19th, appellee J. O. Brown filed a motion for summary judgment. On January 23rd, appellees Daryl Davis and D. A. Ross filed their motions for summary judgment. Said motions were set for hearing February 3, 1956, as provided by the rules. Appellees each had filed answers to appellant's amended petition, on which citation was issued in April 1955, soon after the filing of said amended petition, setting

out their defenses to appellant's cause of action. Appellant admitted that he had been in Midland continuously from January 23rd to February 3rd, and no good reason was shown why he couldn't have obtained an affidavit, or affidavits, from people living in Midland County who were familiar with price of oil and gas leases in the area where this land was located in April 1951. The evidence sought to be shown by Mrs. Smith was not material to the questions on which the trial court decided the case. It appears, under all these facts and circumstances, and especially in view of the total lack of diligence shown by appellant in prosecuting his suit, that the court did not abuse its discretion in denying a continuance on the motions for summary judgment.

Appellant complains that he should have been allowed to go to the jury on the disputed question of whether or not he received a deed from J. O. Brown in satisfaction of a trust, even though said deed had been lost or destroyed. If this was the determining question in the case, the appellant would be right, because a written instrument is merely evidence of a right, and its loss does not destroy the right itself: Fielder Lumber Co. v. Smith, Tex.Civ.App., 151 S. W. 605 (error ref.). Neither does the loss of a deed destroy the title of those claiming under it: Shepard v. Heirs of Cummings, 44 Tex. 502. The question before the trial court, however, was not whether appellant had produced any evidence of a lost deed showing title in himself, but whether or not he was

in position to establish that title in the face of the pleas of limitation, laches, stale demand and innocent purchase for value. Since the apparent legal title is shown to be in appellees, and appellant is shown not to be in possession of the claimed property, it appears that he cannot maintain his suit unless he can prove up the alleged lost deed. Courts of equity are fairly liberal in recognizing the right to make such proof. However, such right is subject to the four-year statutes of limitation, Vernon's Ann. Civ. St., Art. 5529, and to the defense of laches and stale demand. In 28 Texas Jurisprudence 293, the law is stated as follows:

> "A suit to restore a lost instrument is an 'action' within the language of the statute of limitation and as no period of limitation is specially prescribed by statute, it is subject to the bar of the four years' limitation. A proceeding of this character is also subject to the defense of laches." Also, see 19 American Jurisprudence, pages 339 and 340.

We believe that appellant has lost his right to prove up the alleged lost deed by reason of the four-year statute of limitation. We base this opinion upon appellant's own testimony. He stated that the last time he had seen the deed was during the year 1935 or 1936, and at which time the deed had not been recorded. He stated he had a fire in his office in Abilene in the year 1950; that all the files pertaining to the land in question were destroyed. He gave no

APPENDIX "F" Continued

other explanation for the loss of the deed. He knew that the deed had not been recorded. In December, 1951, when he found out that J. O. Brown had executed an oil and gas lease on the minerals in question, he immediately filed a formal trespass to try title action on December 14, 1951. He had lis pendens notice filed in the county clerk's office. He stated that he had no excuse for not having had citation issued in said cause; that he had been in the clerk's office, examined the file, and know that citation had not been issued; that citation was not caused to be issued until April 1955, whe he filed his first amended original petition setting up the lost deed. We hold that the statute of limitation began running in 1950, at the time of the destruction of appellant's files on this land, and that the filing of suit, December 14, 1951, without causing citation to be issued, and without offering any excuse why such citation was not issued before April, 1955, did not stop the statute of limitation from running. Appellant cannot excuse himself by saying that he did not discover the loss of the deed at the time of the fire, because it would have taken very little effort and diligence to have discovered such loss: Texas Osage Cooperative Royalty Pool v. Colwell, Tex.Civ. App., 205 S.W. 2d 93.

Even had limitations not run against appellant, he still would be barred from making proof of his lost deed, because of the rule of laches and stale demand, and because of his unexcused failure to dili-

gently prosecute his suit after the filing thereof; Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co., 5 Cir., 279 F. 977. After suit was filed in December 1951, appellant knew that oil activity in the area became active. A producing offset well was drilled on this property in April 1953. In 1954, four producing oil wells were drilled on this very property, and still appellant set still and did nothing. Appellant, being a lawyer who had tried numbers of cases of this nature, both as litigant and as attorney for clients, knew at the time he filed his original petition that the only way he could establish title was through a court of equity. He knew he did not have actual possession of the minerals and could not reduce them to possession except by producing them; and, knowing the shape of his claimed title was in, it was his duty to proceed with diligence in prosecuting his suit to establish his title. Any unreasonable delay, unexcused, in the situation which we have presented here, is fatal to his right to establish the trust agreement, or his lost deed.

Daryl Davis and D. A. Ross showed that they were purchasers for value, without notice of any claim of Chandler. No evidence of any probative force was offered to the contrary. We therefore overrule appellant's points complaining that the court should have submitted such issues to the jury.

All appellant's points being overruled, the judgment of the trial court is affirmed.

APPENDIX "F" Continued

JUDGMENT OF COURT OF CIVIL APPEALS

March 13th, 1957. This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, J. O. Brown, Daryl Davis and D. A. Ross, do have and recover of and from the appellant, J. M. Chandler, and his sureties, Chas. L. Klapproth and Louis F. Shanks, all costs in this behalf incurred, and this decision be certified below for observance.

McGill, A. J., not participating.